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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

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Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, a resident of the State of New York, and two corporations organized under and existing by virtue of the laws of the State of New York, respectfully pray that a writ of certiorari issue to review the final order entered on December 8th, 1944 (R. 1403-4), upon the Remittitur of the Court of Appeals, the highest court of the State of New York (R. 1402), denying leave to appeal to the Court of Appeals, from an order of the Appellate Division of the Supreme Court of the State

of New York, First Judicial Department, entered on June 9th, 1944 (R. 1369-70), affirming an order of the Supreme Court, New York County, entered on June 8th, 1943 (R. 4), denying petitioners' application to vacate and set aside the Decision and Order of the New York State Labor Relations Board dated December 31st, 1942 (R. 1329-59).

Opinions Below.

No opinion was rendered by any of the courts of the State of New York. The Special Term of the Supreme Court, New York County, wrote a short memorandum (R. 4), not reported.

The affirmance by the Appellate Division, First Judicial Department, was without opinion (R. 1394) and is reported in 268 App. Div. 759 (case 4). The order of the Appellate Division, First Judicial Department, denying leave to appeal to the Court of Appeals, was without opinion (R. 1396) and is reported in 268 App. Div. 849 (case 6).

The order of the Court of Appeals of the State of New York, denying leave to appeal to it, was also without opinion (R. 1401) and is reported in 293 N. Y. (weekly advance sheets No. 297, Jan. 6, 1945, p. i).

Jurisdiction.

The final order of the Court of Appeals of the State of New York was entered on November 30th, 1944 (R. 1401) and the final order of the Supreme Court of New York, County of New York, making the said order of the Court of Appeals its order, was entered on December 8th, 1944 (R. 1403-4). The time for filing a petition for a writ of certiorari to this Court was extended to April 16th, 1945 by order dated February 19th, 1945 (R. 1405), and was further extended to April 28th, 1945, by order dated April 13th, 1945.

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code (28 U. S. C. §344).

Questions Presented.

1. Whether the construction by the courts of the State of New York of the provisions of the Act (*infra*, (p. 35), which, in effect, gives to a union free and untrammeled license to attack and vilify an employer and at the same time forbids an employer from replying to, or commenting upon, such attacks, does not deprive such employer of its right of free speech, as guaranteed by the First Amendment, and, further, does not deny to such employer the equal protection of the laws, as guaranteed by the Fourteenth Amendment.

2. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon comment by the employer referring generally to unions, at a time concededly well prior to any activity whatsoever by the complaining union and which comment does not refer to the complaining union, does not deprive such employer of its right of free speech guaranteed to it by the First Amendment.

3. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon the comment of the employer concerning a union:

that at no time had ever asserted a claim of representation of the employer's employees;

that at no time had ever requested nor demanded recognition as the collective bargaining agent of the employees of the employer, nor sought such bargaining;

that had never filed an application with the New York State Labor Relations Board, nor any other agency, for

certification as collective bargaining agent for any of the employees of the employer, nor had filed any charge of unfair labor practices against the employer;

and which comment was made by the employer at a time when no proceedings of any kind were pending before the New York State Labor Relations Board, nor any other agency, concerning the employer, and at a time when no election by employees to designate a collective bargaining agent had been ordered by the New York State Labor Relations Board, nor any other agency, nor even petitioned for by such union, does not violate the employer's right of free speech as guaranteed by the First Amendment.

4. Whether an order adjudging that an employer has violated the provisions of the Act (*infra*, p. 35), based upon a finding that comment by an employer to its employees coerced the employees, when the record contains no evidence showing coercion, is supported by evidence, and does not deprive the employer of its right of free speech guaranteed by the First Amendment, and of its property without due process of law and of the equal protection of the laws, as guaranteed by the Fourteenth Amendment.

5. Whether an employer may not, in the light of the provisions of the Act (*infra*, p. 35), comment to its employees concerning the activities of a union seeking to organize its employees, and whether such comment is not privileged by the provisions of the First Amendment.

Constitutional and Statutory Provisions Involved.

The relevant portions of the Constitution are set forth in the Appendix, *infra*, page 36.

The relevant portions of the Act are set forth in the Appendix, *infra*, page 36.

Statement.

The ground or grounds upon which the courts below upheld the order of the New York State Labor Relations Board (R. 1329-59) (hereinafter, for facility, referred to as the Board) are unknown, as no opinions were written. The memorandum decision of the Special Term of the Supreme Court cited two cases, *Stork Restaurant Inc.* v. *Boland, et al.*, 282 N. Y. 256 and *N. Y. S. L. R. B.* v. *Montgomery Ward & Co., Inc.*, 179 Misc. 298 (R. 4) that stand generally for the proposition that the Board's orders will be sustained if there be substantial evidence in the record. "The findings of the board as to the facts, if supported by evidence, shall be conclusive" (New York State Labor Relations Act, Sec. 707(2). And see *Stork Restaurant Inc.* v. *Boland, supra*, at pages 266-7. This, it may fairly be assumed, constitutes the basis for the several decisions of the State courts.

The record in this proceeding consists of 1,406 pages, bound in two volumes and a supplement. Much of that record is not germane to the constitutional questions raised by this petition. The summary here presented will be devoted only to such portions of the evidence and record that are pertinent to those issues.

At the outset, let it be clear that petitioners raised the constitutional question below. In their brief before the Appellate Division, First Judicial Department, petitioners asserted that the Board's final Decision and Order "• • • is not supported by substantial evidence and invades appellants' (petitioners') right of free speech". In their reply brief before the same court, one of petitioners' points was "Appellants (petitioners) reiterate that respondent's order violates the First Amendment to the Constitution".

In support of their contention, petitioners cited *National Labor Relations Board* v. *American Tube Bending Company*, 134 Fed. 2d 993, cert. den., 320 U. S. 768, *National Labor Relations Board* v. *Virginia Electric and*

Power Company, 314 U. S. 469, *Boeing Airplane Co., Wichita Division* v. *National Labor Relations Board*, 140 Fed. 2d 423, *Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 Fed. 2d 922.

The Board, before the Appellate Division, contested petitioners' constitutional point, arguing vigorously that petitioners' right of free speech had not been invaded. It cited, in addition to the *Virginia Electric and Power Co.* and *American Tube Bending* cases, *supra*, *National Labor Relations Board* v. *Trojan Powder Co.*, 135 Fed. 2d 337, cert. den. 320 U. S. 768 (rehearing denied, idem 813), *National Labor Relations Board* v. *Sunbeam Electric Manufacturing Co.*, 133 Fed. 2d 856, *National Labor Relations Board* v. *Pick Manufacturing Co.*, 135 Fed. 2d 329, and *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 Fed. 2d 371, cert. den. 322 U. S. (89 Law Ed. Adv. Op. No. 1, p. 39)

The application made by petitioners to the Appellate Division, for leave to appeal to the Court of Appeals, was based almost entirely upon this same contention (R. 1374-5).

The Board, in opposing this application, took square issue with this contention (R. 1378-9).

The application by petitioners to the Court of Appeals, for leave to appeal, similarly was based largely upon this same ground (R. 1383). The larger portion of petitioners' brief in support of this application was concerned with the issue of free speech, citing, in addition to the authorites already enumerated *supra*, *National Labor Relations Board* v. *Citizen-News Co.*, 134 Fed. 2d 962, and 970.

The Board, in its argument, again predicated its opposition on the ground that no issue of free speech was involved. Its brief there cited, in addition to the authorities already mentioned as having been cited by it, *National Labor Relations Board* v. *Laister-Kaufman Aviation Co.*, 144 Fed. 2d 9.

Nevertheless, despite the fact that no court of the State of New York had ever passed upon that constitutional issue, in the light of the provisions of the Act and the obligations laid upon an employer by those provisions, no opinion was forthcoming.

The proceeding before the Board was initiated by its complaint (R. 26-32), which in effect charged petitioners with having engaged in unfair labor practices within the meaning of the Act (Sec. 704, subds. 4, 5 and 10) (R. 30-1).

This complaint contained two specifications. One was that three certain employees, to-wit, Jay Irving, Edwin Cohen and Philip Klass, had been discharged because of membership and activity in the union involved (R. 28-9).

The second specification charged petitioners with, "since January 1, 1942", restraining and coercing their employees in their rights of self-organization, by directing and warning them to refrain from joining the union, by disparaging and vilifying the union, by threatening to go out of business or curtail personnel if compelled to deal with the union, and by questioning employees as to their membership and activity in the union (R. 29-30).

This complaint named the three entities as they appear in the instant proceeding (R. 26). The separate verified answers interposed by each of the petitioners (R. 38-43) put in issue all of the material allegations of the Board's complaint. The answer of petitioner Marcus contained also an affirmative defense that some of his employees had been, and were at that time, union members (R. 1063-4, 1222, 1331).

The union's charge, upon which the Board's complaint was based, rested completely upon the alleged discriminatory discharges of the three named employees (R. 35). As the matter was tried by and before the Board, it was concerned almost entirely with these alleged discriminatory discharges (R. 1222).

The Intermediate Report of the Trial Examiner sustained the complaint in its entirety (R. 1216-70). The Trial Examiner specifically found that these three employees had been discharged as "a direct result of their membership in the union and their activities on its behalf" (R. 1264).

He found further that petitioners had "subsequent to January 1, 1942", violated the provisions of subdivisions 4, 5 and 10 of Section 704 of the Act and sustained, with but one exception, the allegations as stated in the second specification hereinabove (*supra*, p. 7) (R. 1265-7).

This exception has to do with the allegation in the complaint ([d] R. 30) that petitioners had questioned their employees concerning union membership and activity. Concerning this allegation the Examiner made no finding whatsoever (R. 1266-7). He did find that the three entities named in the Board's complaint "at all times acted on behalf of and in the interest of one another and to all practical purposes were one and the same" (R. 1262).

Petitioners duly filed Exceptions to this Intermediate Report (R. 1277-81). Thereafter oral argument was had before the Board (R. 1287-1328), following which the Board issued what it terms its Final Decision and Order (R. 1329-59).

The Board's Order specifically reversed the Trial Examiner as to Klass (R. 1345-8, 1353, 1355) and dismissed the complaint insofar as it related to him (R. 1358). The Examiner's Findings as to Irving and Cohen were sustained (R. 1352-4).

The Board made no specific findings in support of the allegations of interference, restraint and coercion, as alleged in the complaint (R. 30), but simply stated, generally, that petitioners "by others acts, have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353). The

Board's Conclusion of Law in respect of this phase was similarly general and without specification (R. 1354).

The Board found also that petitioners "act on behalf of and in the interest of one another and are part of a single enterprise headed by Sam Marcus" (R. 1352). It concluded as a matter of law, that all of the petitioners "are employers within the meaning of Section 701, subdivision 2, of the Act" (R. 1354).

Marcus is president of 42nd St. Foto Shop, Inc., which is located at 18 East 42nd Street (R. 736). Petitioner Fotoshop, Incorporated is merely a holding corporation, not engaged in any business, and without employees (R. 737, 739).

Petitioner Marcus conducts two other separate businesses, one known as Marcus Photo Service and the other as Fotoshop. The former, merely a photo finishing laboratory, unconnected with the retail business (R. 737), is located on the fifth floor of the building at 132 West 32nd Street, New York City (R. 421). The latter, a retail business, was located at 130 and 136 West 32nd Street, New York City (R. 42).

As already stated, the entire situation here was concerned only with petitioner 42nd St. Foto Shop, Inc. and its employees. The Board, nevertheless, issued its order against the other two petitioners, despite this factual hiatus, and in the face of timely motions to dismiss (R. 759-61, 1181-2).

There is literally no question of the lack of any evidence, to say naught of substantial evidence, connecting either Fotoshop, Incorporated or Sam Marcus, d/b/a Marcus Photo Service and as Fotoshop, with the alleged discriminatory discharges or with any deed in violation of the provisions of the Act. Fotoshop, Incorporated had no employees at all. Marcus Photo Service, an individual enterprise of Marcus, was in a wholly different field of business. His other individual enterprise, Fotoshop, was not the employer of either Cohen or Irving.

The only specific and concrete Finding of Fact made by the Board, upon which it predicated its conclusion that petitioners had violated the provisions of the Act, was that Irving and Cohen had been discharged "because of their membership and activities in the Union" (Finding No. 10, R. 1352). Upon this it based the further Finding that petitioners thereby "discouraged membership in a labor organization by discriminating in regard to hire and tenure of employment" (Finding No. 12, R. 1353), and, "required their employees, as a condition of employment, to refrain from forming or joining or assisting a labor organization of their own choosing" (Finding No. 13, R. 1353).

Despite the specifications of the complaint (R. 30-1), the Board further made only the general finding that petitioners "by other acts, have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (Finding No. 16, R. 1353). The Conclusions of Law follow the same pattern (Conclusions Nos. 3, 4 and 5, R. 1354).

The two ultimate conclusions reached by the Board, to-wit, that two of the employees had been discharged because of union activity, and that petitioners had, generally, interfered with, restrained and coerced their employees in their right of self-organization, depend entirely, and literally that, upon testimony of alleged comment by the employer (R. 1336-8, 1348-50).

Upon this basis, the Board concluded that "Marcus and his wife, * * * were intensely hostile to unions" (R. 1336-7), and implemented this conclusion with its ultimate finding that the Act had been violated.

The two employees involved, Irving and Cohen, were employees only of petitioner 42nd St. Foto Shop, Inc. Cohen had started working for it on either July 21st or 23rd, 1941 (R. 155) and his employment terminated on January 23rd, 1942 (R. 28, 192, 1188-9, 1352). Irving com-

menced working for this petitioner in November, 1941 (R. 389) and his employment terminated on January 12th, 1942 (R. 28, 472, 1352).

The Board's complaint limited the alleged interference with, restraint and coercion of the employees, to "At all times since January 1, 1942 * * * " (R. 29, pa. 16). The Trial Examiner similarly limited his findings of interference, restraint and coercion to "Subsequent to January 1, 1942, * * * " (R. 1265-6, Finding No. 20).

The earliest date upon which it is even asserted the complaining union began its activities is January 7th, 1942 (R. 1339). Thus, the allegations in the complaint and the finding of the Trial Examiner are consistent with the beginning date of January 1st, 1942.

But the Board, even though it sustained its complaint, except as to the discharge of the employee Klass (R. 1355, 1358) and the charge of questioning of employees (R. 1354), deliberately refrained from including that significant date in its findings. It merely concluded, broadly, that the petitioners " * * * have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353, No. 16), and that petitioners " * * * have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them by Section 703 of the Act, and have engaged in, and are engaging in, unfair labor practices within the meaning of Section 704, subdivision 10, of the Act" (R. 1354, No. 5).

Analysis of the record points the reason for this extraordinary performance. Under its heading of "Background" (R. 1336 ff.), the Board condoned the glaring error of its Examiner in taking testimony as to alleged comment by petitioners, denominated as unfavorable to unions, made a considerable time prior to January 1st, 1942; comments made at a time when the complaining union admittedly had not even approached any of the

employees (R. 1339); comments made in respect of matters that filled the public press (the Gimbel Bros. strike [R. 1337]); comments that referred to happenings of "six or seven years ago" (R. 1337); comments that referred to another union (of photo finishing employees), with which this union was not even remotely connected (R. 1337-8).

All of this ante-dated by a considerable period the situation at the premises of petitioner 42nd St. Foto Shop, Inc., the employer of the discharged employees. Contra this, the second incident relied upon by the Board was the talk made by petitioner Sam Marcus, president of 42nd St. Foto Shop, Inc., to the employees of that corporation, in February of 1942. The discharges occurred between those dates.

The Board looked to the north, then to the south, and finding a vacuum, determined to fill it by the simple expedient of placing a muzzle on the employer, throttling any expression of opinion or of comment whatsoever. The courts below fell right in line, in direct derogation of petitioners' constitutional right.

Thus, the comment by the employer, which petitioners urge is privileged, falls into two time categories, before and after January 1st, 1942. These will be taken up *seriatim*.

The Board's summary of the comment prior to January 1st, 1942, is contained in its Final Decision (R. 1336-8). This is based entirely upon the testimony of one witness, the employee Irving. The Board's own statement discloses that this comment stemmed from two extraneous happenings—a strike at Gimbel's department store, located directly across the street from the 32nd Street store of petitioner Sam Marcus doing business as Fotoshop, and a strike conducted by another union against Marcus Photo Service (R. 1337-8). These incidents occurred months before January 1st, 1942.

The comment thus isolated by the Board was: "Unions seem to be created for the purpose of annoying employers" (R. 1337); a quotation of Mrs. Marcus, referring to the Gimbel strike, that she said "she made it a point of going into Gimbels every day just to walk through whether she bought anything or not, just to show the pickets" (idem); that "his (Marcus') employees could always come to him with their problems and there is no necessity of going to unions, and his employees don't believe in unions" (idem); and a remark attributed to Sam Marcus, referring to striking employees of another concern, members of another union, that such striking employees were "a bunch of ingrates who didn't know when they were well off and that it's unfortunate that they will have to lose their jobs because of being misguided by a racketeering union" (R. 1337-8).

Without specification, the Board attributed to others "* * * implications derogatory to unions" (R. 1337) and "* * * similar comments" (R. 1338).

The record places these remarks in an environment that alters quite substantially the animus and motivation that the Board sought to convey by quoting them in naked isolation. Objection was timely made to the introduction of testimony ante-dating January 1st, 1942 (R. 425-7, 432-3, 437-41).

In view of the outcome before the Board, it is well to set forth in full a statement of the Examiner, apropos of these objections:

> "Trial Examiner: In overruling counsel's objection, the Examiner will state that he is well aware that any expression of opinion by Mrs. Marcus as to a union not involved in this proceeding does not in and of itself express any anti-union opinions that she might have or might not have with the union involved in this proceeding" (R. 427).

Both the Examiner and the Board completely forgot this when they wrote their ultimate Findings.

Motions to strike out all of this testimony were also timely made, and denied (R. 764-5, 1182).

Concededly, this comment testified to by Irving as having been made by the employer was made long before Irving was employed by 42nd St. Foto Shop, Inc., the employer who allegedly improperly discharged him (R. 472), and long before the complaining union had become interested in organizing the petitioner's employees (R. 1339). Irving had not at that time even been approached to join the union (R. 577, 609). Nowhere in the record will there be found one scintilla of evidence to show that the complaining union was ever interested in any of the petitioners except 42nd St. Foto Shop, Inc.

Irving's testimony falls into three general categories: Comment referring to the Gimbel strike, comment referring to the photo finishing employees' union strike, and a miscellaneous category, that includes a somewhat remarkable situation.

The first category deals almost entirely with Mrs. Marcus, wife of petitioner Sam Marcus. The testimony was that Sam Marcus had practically nothing to do with the business located on 32nd Street (R. 391, 406) and that Mrs. Marcus was in charge there (R. 392).

Gimbel's department store is located directly across the street from the 32nd Street store (R. 413). Upwards of four hundred pickets were picketing that store on a picket line some six hundred feet long (R. 561). Apropos of that situation, Irving testified that Mrs. Marcus said this:

> The remark already quoted (*supra*, p. 13, R. 422); "Mrs. Marcus would make the remarks *to the customers* who came into the store about the unfortunate situation at Gimbels" (R. 423, empha-

sis supplied); "Well, I mean she was saying 'it's terrible, isn't it, that we have had trouble with unions before and we understand that these people are asking things way beyond them' " (R. 423).

He admitted that, when he said to Mrs. Marcus, apropos of her comment, "I know I wouldn't do that", that neither he, nor employees who had made the same response, was not criticized for that, saying "The subject was dropped. It was a conversation among a group of about eight or nine people and a number of people made comments in both directions" (R. 560). He did specifically admit that her remark " * * * was precipitated by the Gimbel strike, * * * " (R. 500).

He testified distinctly that prior to the Gimbel strike he had never heard Mrs. Marcus, nor any of the supervisory employees, "speak about unions" (R. 423), though in a typical volte face he later changed this testimony (R. 565-6, 570).

The strike of the members of the photo finishing employees' union occurred after the Gimbel strike (R. 572, 599) in September, 1941 (R. 604), and was accompanied with considerable noisy picketing (R. 562) and several picket lines (R. 608). That picketing ultimately was ended by court injunction (R. 608).

Here Irving's testimony was that both Sam Marcus and Mrs. Marcus had made comment. Be it noted again that this ante-dated any activity of the complaining union in respect of 42nd St. Foto Shop, Inc. (R. 425, 577, 609), was not concerned with the complaining union at all (R. 424-5, 575-6), and the comment specifically referred to the union then on strike (R. 572, 597, 610-1).

He testified that he heard a supervisory employee say "that those fellows (the striking photo finishing employees) * * * don't know what they are doing or what they're

letting themselves in for"; that he "heard Mrs. Marcus say that they were considering dropping the photo finishing business rather than give in to that union" (R. 428).

He attributed to Mr. Marcus the remark already quoted (*supra*, p. 13 [R. 429]). He admitted that upon his saying "I would rather not" to Mrs. Marcus' request to help out in the Marcus Photo Finishing Laboratory, he was neither pressed nor criticized (R. 428, 587-8).

He attributed to Mr. Marcus a further remark, concerning the striking photo finishing employees, "that they were allowing themselves to be led around by the nose by a union which is run by non-responsible people, and that they're cutting themselves away from their jobs in doing so because he would go out of business before he would give in to the union" (R. 602).

While there was some additional testimony proffered by Irving concerning alleged anti-union talk by another supervisory employee (R. 430, 431, 609-11), and he made also a tortuous effort to show anti-union bias with reference to an open letter signed by the employees and referring to the photo finishing strike (R. 431, 435, 619-20), what has hereinabove been cited contains both essence and detail of the alleged improper comment. He did admit specifically that the only union to which any of this comment could have had reference was the photo finishing employees' union (R. 610).

One further facet of this phase of the testimony remains, and this is, to put it mildly, remarkable. Irving admitted that when he applied to Sam Marcus for employment, he was "a complete stranger" to him (R. 676-7). He sought to establish a prior knowledge of him by Mrs. Marcus, on the basis that he had occasionally been a customer of the 32nd Street store (R. 677), although he admitted she did not know his name (R. 676).

Despite this, he testified that Mrs. Marcus immediately launched into a discussion of unionism with him, attribut-

ing to her the remark " * * * that a union was completely unnecessary * * *, that the employees don't feel any necessity for a union, * * * " (R. 662).

To Sam Marcus, at the very initial interview, when he was applying for a position, he attributed similar comment, almost in the very same words (R. 663, 677-8).

This witness was zealous, to say the least. How altogether incredible that an experienced employer would thus comment to a strange applicant for a position!

Supervisory employees testified in direct refutation of much of this testimony (testimony of Carr (R. 1345-8), and of Kaplan (R. 885-6, 891, 894-5, 897, 907-8, 910-11, 914-16, 937, 938-9, 948-9, 977).

On what basis the Board justified its selectivity in accepting Carr's testimony concerning the discharge of the employee Klass (R. 1347-8), and in disregarding both his and Kaplan's testimony concerning other alleged anti-union comment attributed to them, is unknown. For the purpose of this petition, however, petitioners rest upon this comment as testified to by the witness Irving.

Out of these remarks, totally devoid of even the suggestion, or a scintilla of coercion, restraint or interference, either actively exercised or potentially employed, the Board fashioned its conclusion that petitioners had violated the Act.

These incidents, and this is the record, complete, as to all of such prior to January 1st, 1942, the significant date in the complaint and the Examiner's Findings, all took place at a time well before, when not only the complaining union, but no union whatsoever, had become active in respect of the employees, and months before the alleged discriminatory discharges.

These incidents, further, took place in respect of an employer other than the employer 42nd St. Foto Shop, Inc., that had allegedly discharged Irving and Cohen for union activity, and on premises of other business entities.

Hard put to it to bolster this gap, the Board jumped to the second incident-in-chief, the talk by Sam Marcus, president of 42nd St. Foto Shop, Inc., to its employees on February 3rd, 1942. The Board summarized this in its Final Decision (R. 1348-9), but not completely. Here again baldness conceals, does not reveal. Admittedly, this incident is of more consequence to the point at issue at bar than the testimony already adverted to, hence it is necessary that far more than the selective extract utilized by the Board be shown, and thus the incident seen in its environment.

To accomplish that, some detailed reference to the testimony must be made. However, this should be noted,—this talk took place weeks *after* the alleged improper discharges.

These discharges constituted the core of the matter before the Board. With a fictitious sense of timing, the Board reached backward (that is, to the alleged anti-union bias ante-dating January 1st, 1942), and then forward (that is, to February 3rd, 1942), and because it found a discharge in between, blithely tinctured the discharge both with that which had occurred long before, and under totally unrelated circumstances, and with that which was yet to happen.

On February 2nd, 1942 the union had distributed a circular about the premises of 42nd St. Foto Shop, Inc. at 18 East 42nd Street (R. 299, 1348). This circular disparaged and vilified that one of the petitioners (R. 1192-3). It charged, among other things, that "we (the employees) are amongst the Lowest paid workers in the entire photographic industry"; that "the large turnover of workers * * * is an indication of insecurity and poor working conditions"; and that "we (the employees) cannot exist on the promises of our employer" (R. 1192). The circular further included a comparative schedule of salaries allegedly paid by petitioner and by a competitor under union con-

tract (R. 253-4) for the same type of work, purporting to show that employees of petitioner 42nd St. Foto Shop, Inc. were paid far less than were those of this competitor (R. 1193).

Petitioner 42nd St. Foto Shop, Inc. reacted immediately. Its president spoke to a goodly number of its employees on the very next day. What he allegedly then said was testified to by three witnesses called by the Board. As this is the crux of the instant proceeding, that testimony is here set forth in full. There is no other way to get this before this Court.

The first witness was one Rafalow (R. 255). By way of preface, attention is directed to an extraordinary situation concerning this witness. He testified through a direct examination (R. 255-61), at length under cross-examination (R. 261-92), again on an extended re-direct examination (R. 292-302), and was well into re-cross examination, when he emerged with the astounding statement, upon being compelled to admit to lack of truth telling, that "I am an atheist", and upon being asked "So that when you took that oath it did not mean a thing to you, did it?", calmly answered "No" (R. 303). Then followed pages of an agonizing effort by Board's counsel to refurbish the witness into some form of decency (R. 314, ff), prior to which he had claimed that he had "stated to the Trial Examiner that I was an atheist" (R. 304), which claim was completely refuted (R. 323).

On direct examination, Rafalow testified as follows:

> "Q. While you were employed at the 42nd Street Fotoshop did you attend a meeting of employees on a particular evening, about six o'clock? A. Yes, I attended a meeting of all the workers there.
>
> Q. About how many were there? A. 45, 50, something like that.

Q. Were they just the employees of the 42nd Street Fotoshop or were they the employees of the 32nd Street shop as well? A. Just the 42nd Street.

Q. And can you fix the date of that meeting? A. February 6th" (R. 256-7).

* * * * *

"Q. Now, what did Mr. Marcus say, as best you can remember? A. He said—he said that, 'Why join the union', he said, 'all of you received this leaflet (Pet. Ex. 9 [R. 1192-3]) which the union gave out last night, and it states here that the workers do not get paid according to the cost of standard of living has gone up, and other things like that'. He then stated that if the raise in pay became effective by the union agreement, then he will have to discharge a lot of younger people working in the place, because of inexperience, and that would mean that the older people will have to take more responsibilities because there isn't enough—because of inefficiency of the younger people, because they are not experienced. He then stated that, 'Why join a union on the outside? Why don't you organize among yourselves?' He called the union a bunch of racketeers and gangsters. Then he said "If you did join the union and you did get a raise, you really won't get a raise because the union will take it away by dues and assessments.' He kept repeating 'dues and assessments' throughout the speech.

Q. Can you remember anything else? A. No.

Q. Did he discuss his own financial condition with you? A. Oh, yes. He said that his accountant was right there and the accountant asked him and told him how he is making profit, he can't see how he is making profit and he also said that he is paying

ten per cent. more than he should pay to the workers.

Q. Did he speak at all of his competitors? A. Yes, he spoke of Abe Cohen's Exchange, Davega and Crawford, I think, was the other, and said that, 'They are under a union and you can't compare them to my store because they are million dollar firms and because of that the union—because of the union Abe Cohen's Exchange is now going out of business'" (R. 260-61).

On cross-examination his testimony was as follows:

"Q. And your statement now is that since February 9th you haven't talked about this case with anyone, is that right? A. The business agent of the union gave me a piece of paper which I signed on the evening of February 9th to refresh my memory.

Q. And you looked over that piece of paper? A. Yes.

Q. Before you got on the witness stand? A. Correct" (R. 271).

* * * * *

"Q. And where was this statement prepared? A. Prepared?

Q. Yes. A. In the union office.

Q. Did you dictate it? A. Yes.

Q. All of it? A. All of it.

Q. Word for word? A. Word for word.

Q. Nobody added anything to this statement or made any suggestions concerning it? A. No one.

Q. And to whom did you dictate it? A. To the union lawyer" (R. 274).

* * * * *

"Q. And every word in this statement, Board's Exhibit 8 for identification (R. 1189 ff.) was dictated by you? A. Yes" (R. 274).

* * * * *

"Q. And these words, I am quoting, 'a copy of said leaflet is hereto annexed',— A. Those weren't my words.

Q. Those were not your words? A. No, they weren't.

Q. So there is something in this statement that you didn't dictate, isn't there? A. Correct" (R. 274-5).

* * * * *

Q. So not everything in this statement was dictated by you, was it? A. No, it wasn't.

Q. So your statement to that effect before this is not true, is it? A. Correct.

Q. What is that? A. Correct.

Q. It is not true? A. That's right" (R. 275).

* * * * *

"Q. Now, I believe you testified on your direct examination that you heard Mr. Marcus call the union a bunch of gangsters and racketeers? A. Yes.

Q. And he was referring to Union Local 830? A. That's right.

Q. He mentioned that union by name when he said that they were a bunch of gangsters and racketeers? A. No, he didn't mention them by name.

Q. So, you just inferred he was talking about Local 830? A. Well, he was talking about the leaflet that 830 gave out so he most likely was talking about the union when he said racketeers and gangsters.

Q. Now, that was a pretty important statement to you, wasn't it? A. Yes.

Q. And it was fresh in your mind on February 9th? A. Correct.

Q. Did you include in this statement that you made on February 9th that Mr. Marcus called the union a bunch of gangsters and racketeers? A. Did I include it?

Q. Yes. A. Yes.

Q. It's in here? A. Yes.

Q. In what words is it in here? A. In English, I guess" (R. 289-90).

* * * * *

"Q. Now, in what words, Mr. Witness, is the statement that you just testified to as having been made by Mr. Marcus in this speech on February 6th, that the union is a bunch of gangsters and racketeers, phrased in this statement? A. 'Why give your money to a bunch of racketeers and gangsters? You could have your own union in here.'

Q. Now, that word 'gangsters' made a tremendous impression on you, didn't it? A. Yes.

Q. And you resented it? A. Certainly.

Q. Now, you show me where the word 'gangsters' appears in this statement. (Hands document to witness.) A. It doesn't appear here.

Q. So it wasn't said by Mr. Marcus, was it, on February 6th? A. It was.

Q. You remember on May 6th, 1942 that he used the word 'gangsters' three months to the day of the meeting, but on February 9th, three days after the meeting you didn't remember it? A. I did remember it.

Q. But you didn't put it in? A. No" (R. 291-2).

He was not specifically questioned concerning this phase of the matter on re-direct examination, but was again on re-cross examination:

"Q. So you, in answering my question concerning the authorship of this Board's Exhibit 8 for identification, withheld a part of the truthful answer, didn't you? A. Yes.

Q. Knowing that you were withholding part of the truth? A. That's correct.

Q. And knowing that you were required to state the whole truth? A. That's correct" (R. 305).

The next witness called by the Board in this connection was one Hertzel, who had signed an application for union membership (R. 341) and was an employee of petitioner 42nd St. Foto Shop, Inc. (R. 328), at the time he testified.

Here again a prefatory comment is required. Hertzel stated that he had heard the manager of 42nd St. Foto Shop, Inc. make a remark that he construed as being hostile to the Union (R. 328-9). He admitted that the remark allegedly made by the manager definitely did not refer to the union involved (R. 354, 366).

The significant aspect of this incident lies in Hertzel's testimony that the manager allegedly made this remark to two salesmen whom Hertzel knew well, but whose identities or names he said he could "not remember". This fantastic attitude of his is spread out over many pages of the record (R. 328-30, 343-55, 1047-9) and serves to illustrate his venom. Hence his admissions are significant (*infra*, p. 27).

On direct examination:

"Q. On what occasion did Mr. Marcus make the speech to which you have referred? A. After the union leaflet was sent out.

Q. Are you referring to Board's Exhibit 9? A. Yes, that's the leaflet.

Q. And how long after the sending of Board's Exhibit 9 (R. 1192 ff.) did Mr. Marcus make this speech? A. The day after the leaflet was sent out.

Q. And before whom did he make the speech? A. Before the employees of Fotoshop.

Q. Where was the meeting held? A. On the third floor.

Q. At what time of day? A. Six o'clock at night" (R. 352).

* * * * *

"Q. Who spoke at that meeting? A. Mr. Marcus.

Q. Alone or did anyone else join the talk? A. No, just he alone.

Q. What did Mr. Marcus say? A. Well, he approached the speech by holding up the leaflet and saying, 'I suppose all of you received one of these yesterday'; and he based his whole speech upon different paragraphs of the leaflet.

Q. Just tell us what he said. A. Well——

Q. As near as you can. A. The main thoughts of the speech were that, 'Why join an outside union when you can join a union amongst yourselves and there wouldn't be as much racketeering attached to the union amongst yourselves as there would be outside.' And he looked at the wage schedule comparing our wages with the wages of other stores and said they weren't true.

Q. Did he mention any other stores by name? A. Yes. He mentioned Abe Cohen's and Crawford's and other outfits that he said were million dollar outfits and they couldn't be compared with Fotoshop; but he was very flattered that they did mention him in the same phrase as those places" (R. 333-4).

* * * * *

"Q. Who was the girl who spoke out? A. Her name was Lenore. (There is no testimony of any 'reprisal' against this girl.)

Q. What did she say? A. She said, 'Mr. Marcus, don't you think that since the cost of living has gone

so much higher that we deserve a raise?' She said, 'My mother can't afford to pay off her expenses on the salary that I am getting', and that she is the main support of her family.

Q. Did she state what her salary was. A. No. I don't believe she did.

Q. Did Mr. Marcus reply to her statement? A. Yes.

Q. What did he say? A. He said that well, his expenses had gone up also and that he has to pay more for his goods and therefore he couldn't very well raise his salaries and that he is paying ten per cent. more to his employees now than he is supposed to. He said that his accountant is right there and he can verify it.

Q. Can you recall anything else that was said by Mr. Marcus at that meeting? A. Oh, yes. As to the salaries he said that he doesn't pay anyone of his salesmen less than $30 a week and I don't remember—I think he went down the line and compared the other salaries too and disputed those salaries against what he pays.

Q. Did he say anything else with reference to either Local 830 or any other outside union? A. Well, he said that—when he said to form a company union, well, he didn't use those words. He said, 'Why not form a union amongst yourselves? The other union is—they are racketeers and they are reigned by racketeers and why—that even if you do get a larger salary most of your salary will go out into dues and assessments.'

Q. Can you think of anything else he said? A. No, I can't" (R. 334-5).

* * * * *

"Q. Do you recall anything else in that connection? A. He also said that if he was to sign a con-

tract, a union contract, he'd have to fire the inexperienced employees that are now gaining experience even though they are getting small salaries and just keep the old employees who will have to become doubly efficient.

Q. Did he make any reference to strikes, any reference whatsoever? A. Not that I recall" (R. 336).

On cross-examination:

"Q. You didn't read this document, Board's Exhibit 8 for Identification (R. 1189 ff.) at all, before you signed it, did you? A. No, I didn't" (R. 337).

• • • • •

"Q. Did you take any notes while Mr. Marcus was talking that evening? A. No" (R. 343).

• • • • •

"Q. Did you hear Mr. Marcus characterize Local 830 as a bunch of gangsters? A. Not 830 in particular.

Q. Did you hear Mr. Marcus characterize Local 830 as a bunch of racketeers? A. No.

Q. The talk that he gave that night was devoted mainly to specific answers of the allegations or statements made in this Board's Exhibit 9, wasn't it? A. This one?"

• • • • •

"Q. He referred to the paragraphs here by number and answered those? A. That's right.

Q. And then he took up this statement here about comparison salaries and he answered those; is that right? A. That's right.

Q. And that was what he talked about? A. That's right" (R. 361).

• • • • •

"Q. And do you say also that when Mr. Marcus said here, quoting you—I am reading now from Board's Exhibit 8 for Identification: 'He then falsely said, "I never pay a camera salesman less than $30 a week" ', do you know that that statement is false?"

* * * * *

"A. No, I couldn't say about a camera salesman" (R. 362).

* * * * *

"Q. So this statement isn't true, is it?"

* * * * *

"A. No" (R. 364).

It should be noted that this witness specifically denied that Marcus characterized the union as gangsters or racketeers (*supra*, p. 27).

The third witness was one Bordin, who testified as follows on direct examination:

"Q. Did you ever attend a meeting of employees at the 42nd St. Foto Shop? A. Yes, I did.

Q. On what day? A. I believe that was on February 2nd" (R. 701).

* * * * *

"Q. Who was talking when you came up to the meeting? A. Mr. Marcus.

Q. What did he say? A. I don't recollect too well.

Q. As best as you can remember, the substance of what you remember his having said. A. He did mention about he didn't mind us organizing."

* * * * *

"A. He didn't mind us organizing by ourselves but he didn't care to have or see an outside union

taking advantage of us; and the raises in salary would go toward dues and assessments; and if we didn't like the job we should quit and 'not knife him in the back'.

Q. Do you remember anything else? A. Very vague.

Q. Do you want to think some more about it or have you given us your best recollection? A. Maybe I will think of some more things as I go along. I did make a statement at that time in writing.

Q. At what time? A. Right after that meeting.

Q. How long after that meeting? A. Oh, a day or two" (R. 705-6).

Despite the witness' claim that he had made a written statement after the meeting, which he delivered to the union organizer (R. 706-7), no such statement was ever produced. This witness said absolutely nothing about "gangsters" or "racketeers".

At the risk of the length involved, it has been felt necessary to set forth in this detail this comment for the Board's summary (R. 1348-9) is neither accurate nor complete. This does not require that this Court pass upon the factual Findings made by the Board. Presumably, the affirmance by the courts of the State of New York, in view of the provision of the Act, places those Findings as such, outside the scope of review here (cf. *Matter of Stork Restaurant, Inc.* v. *Boland, loc. cit. supra*, p. 5).

As will be shown by the discussion in the supporting brief, petitioners' position is that all of the comment testified to as having been made before January 1st, 1942, apart from its fatal deficiency of incompetence under the Board's complaint, is wholly privileged as protected right of speech, comment and opinion.

Further, do petitioners urge, that the comment on February 3rd, 1942 was a protected and privileged response

to the vilifying attack made by the union against the employer. The decision of the courts below, apropos of this, must be reversed in order to afford to petitioners the equal protection of the laws.

Specification of Errors to Be Urged.

The Court of Appeals of the State of New York erred:

1. In failing to hold that an employer has the same freedom and right, no more but no less, to comment and express opinion concerning a union that has disparaged and vilified it, as it grants to such union in respect of such employer, thus denying to the employer the equal protection of the laws.

2. In failing to hold that utterances by an employer to its employees, which contain no threats, actual nor implied, but at most are merely expressions of preference against unionization, are privileged and protected as free speech as a matter of law.

3. In holding, in effect by affirmance, that a general Board finding of coercion, restraint and interference, in the absence of evidence of such apart from the remarks of the employer that are privileged as free speech, is supported by evidence.

4. In holding, in effect by affirmance, that what is constitutionally protected free speech constitutes merely a question of fact for the Board, whose determination thereof is not subject to judicial review.

5. In failing to vacate and set aside the Decision and Order of the Board.

Reasons for Granting the Writ.

1. The courts of the State of New York have decided Federal questions of substance not theretofore determined by this Court.

This Court has several times considered and defined the obligations, rights, privileges and immunities of employers in respect of the provisions of the National Labor Relations Act (29 U. S. C. §151 *et seq.*), but never their obligations, rights, privileges and immunities in respect of a labor relations act of a state, and particularly of the State of New York.

This case then is one of first impression, involving the construction, application and interpretation of the duties of an employer, pursuant to the provisions of the New York State Labor Relations Act, when viewed in the light of the First and Fourteenth Amendments (based upon the rights of free speech and equal protection of the laws). Similarly is this one of first impression involving construction, application and interpretation of the duties of an employer pursuant to the provisions of any state labor relations act, when viewed in the light of the First and Fourteenth Amendments.

2. The courts of the State of New York have decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

The provisions of the New York State Labor Relations Act are almost verbatim those of the National Labor Relations Act. The courts of the State of New York have held that the decisions of the Federal courts construing the National Labor Relations Act are to be given great weight in interpretation of the State Act (*New York State Labor Relations Board* v. *Timen*, 264 App. Div. 120, at p. 122; see also Matter of *Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, 22).

The result reached by the courts of the State of New York is not in accord with that announced by the United States Circuit Court of Appeals, Second Circuit, in *American Tube Bending Co.* v. *National Labor Relations Board*, 134 Fed. 2d 993, cert. den. 320 U. S. 768.

This Court has repeatedly held that the protection afforded by the First Amendment is not diminished by the requirements of the National Labor Relations Act (see authorities cited in supporting brief.

The similarity, indeed almost identity, of the provisions of the New York and the National Acts, plus the rule pronounced by the New York courts (*Matter of Timen*, and *Davega-City Radio, Inc.* v. *Boland*, p. 31, *supra*) and the controlling effect of the Federal Constitution afford no basis for distinction in the application of such holdings by this Court, merely because a state act is involved. Consequently, the protection afforded by the First Amendment is, under the decisions of the courts of the State of New York, equally effective, despite the requirements of the State Act.

3. This case is one of vast public interest and importance. Without a decision by this Court, petitioners, as well as all other employers in the State of New York, and in other states having similar labor relations acts, cannot know the limits of their rights under the First Amendment, nor what communications or utterances they may address to their employees.

Further, if the holdings of the New York State courts be permitted to stand, without some clarification, neither petitioners nor other employers in the State of New York, and in other states having similar labor relations acts, may, with any safety, defend themselves against vilification and other attack by unions.

4. The holding of the State courts of New York, in effect, denies to petitioners the equal protection of the

laws. Apparently a union, short of committing a criminal libel, may say what it pleases concerning an employer, but the employer is sharply and narrowly restricted in his defense or counter to such attack. The failure of the courts of the State of New York to set forth any delimitation of the rights of an employer in this respect, has clouded the protective scope of the provisions of the Fourteenth Amendment.

The decision of this Court is necessary that employers in the State of New York, and in other states having similar labor relations acts, may know what constitutes a proper communication to their employees, what subject matter may form the content of such communications, and to what extent employers may discuss with their employees matters relating to the labor relations between them.

The Federal courts have held that expressions of preference, or indeed of hostility to unions, unaccompanied by interference, restraint or coercion, are not in violation of the provisions of the National Labor Relations Act. The effect of the holding by the courts of the State of New York is that such expressions under such circumstances are in violation of the State Act, which is worded almost precisely the same as is the National Act.

Under the circumstances here presented, of a union not certified by the Board, not having made any demands upon the employer, not claiming even to represent a majority of the employees, and with no election or other proceeding pending, the silent holding of the courts of the State of New York leaves employers in that State completely in the dark concerning what they may or may not say to their employees concerning unions, and what they may or may not say to their employees in defense against attack made against them.

CONCLUSION.

The holdings below with respect to what conduct by an employer constitutes restraint and coercion of employees and interference with employees' right of self-organization, depart from principles laid down by this Court and by the Circuit Court of Appeals, Second Circuit. A question of public importance concerning enforcement of the New York State Labor Relations Act, when viewed in the light of the constitutional guarantees of free speech and equal protection of the laws, is raised.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

SOL. A. HERZOG,
Attorney for Petitioners.

April, 1945.

APPENDIX.

New York State Labor Relations Act (Pertinent Provisions).

§701. Definitions.

When used in this article:

* * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

* * * * *

§703. Rights of Employees.

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section. Added L. 1937, c. 433, §1; amended L. 1940, c. 773, eff. April 26, 1940.

§704. Unfair Labor Practices.

It shall be an unfair labor practice for an employer:

* * * * *

4. To require an employee or one seeking employment, as a condition of employment, to join any company union

or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

* * * * *

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three. Added L. 1937, c. 443, §1, eff. July 1, 1937.

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(32)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216.

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION.

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Attorney for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,
Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Final Decision and Order of the New York State Labor Relations Board (hereinafter referred to as the Board) is reported in 5 S. L. R. B. (N. Y.) 1350. The decision made at Special Term, Supreme Court of New York, New York County, is not officially reported and appeared in New York Law Journal (Vol. 109, No. 130, June 5, 1943).

The decision of the Appellate Division, First Judicial Department, affirming the decision made at Special Term, is reported at 268 App. Div. 759 (case 4). The decision of that same Court, denying leave to appeal to the Court

of Appeals, is reported at 268 App. Div. 849 (Case 6). The decision of the Court of Appeals of the State of New York, the highest court of the State, denying the application for leave to appeal to it, is reported in 293 N. Y. (Weekly Advance Sheets No. 297—Jan. 6, 1945, p. i).

No opinions were written by any of the Courts below, except for the memorandum of Special Term (R. 4).

Jurisdiction.

Jurisdiction to entertain this petition is based upon the Judicial Code, section 237(a), amended (28 U. S. C. §344).

Questions Presented.

The questions presented are set forth in full in the Petition, pages 3-4, and are here incorporated by reference.

Statutory and Constitutional Provisions Involved.

The statutory and constitutional provisions involved are set forth at length in the Appendix, page 25, 26.

Statement.

Those portions of the record below that are germane to the issues raised by the Petition are contained in the Statement of the Petition, pages 5-30 to which reference is respectfully made. Hence, that statement of facts is not here repeated. Reference will be made in the Argument hereinbelow presented, to that Statement.

Specification of Errors to Be Urged.

The errors to be urged are stated in the Petition, page 30, and are here incorporated by reference.

Argument.

> "But I must admit that in overriding the findings of the Texas court we are applying to Thomas a

rule the benefit of which in all its breadth and vigor this court denies to employers in National Labor Relations Board cases (citing cases). However, the remedy is not to allow Texas improperly to deny the right of free speech but to apply the same rule and spirit to free speech cases whoever the speaker". Jackson, *J.*, concurring in *Thomas* v. *Collins* (*not yet officially reported*, 89 Law ed. Adv. Op. 340, 356).

Just prior thereto Justice Jackson wrote:

> "Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication" (loc. cit., p. 356).

From that fundamental statement stem the contentions of petitioners. In view of the almostt complete identity of the pertinent provisions of the National Labor Relations Act (29 U. S. C., §151 *et seq.*) with those of the Labor Relations Act of the State of New York (*Matter of Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, 22), this proceeding raises for the first time the issue

of application of the constitutional guarantees to an employer, in the light of the requirements of the State Act.

Nine states other than New York have enacted labor relations acts:

Colorado
Kansas
Massachusetts
Michigan
Minnesota
Pennsylvania
Rhode Island
Utah
Wisconsin

While varying in details, and in some important provisions as well, one common denominator, present in the New York State Act, is found in all these other state enactments, to-wit, the guarantee to employees of their right to self-organization, free from interference, restraint or coercion of an employer.

In two important respects some of these state acts are distinctive. Those of Colorado and Kansas specifically provide that their labor relations acts are not to be construed in derogation of the constitutional right of free speech.

Those of Michigan, Minnesota, Pennsylvania and Wisconsin include a category of unfair labor practices that may be committed by employees, or their representatives. Such a provision is not found in the New York State Act.

The importance of, then, if not indeed the need for, a definitive statement by this Court, defining the applicability of the constitutional guarantees in labor disputes within a state and arising out of a state act, is obvious. This Court has quite recently elaborated upon that in respect of the obligations and duties imposed upon employers by

provisions of the National Labor Relations Act. No case has yet been presented to this Court, which raises this issue, stemming out of the enforcement by a state court of the provisions of a state labor relations act.

This issue constituted the basis for the jurisdiction assumed by this Court in *Senn* v. *Tile Layers Protective Union, et al.*, 301 U. S. 468. Involved there was an attack upon the determination of the Supreme Court of Wisconsin in a proceeding based upon the provisions of the Wisconsin Labor Code (Wisconsin Statutes, 1935, §§103.51-103.63).

In denying a motion to dismiss the appeal for want of jurisdiction, on the ground that no substantial Federal question was presented, this Court wrote:

> "Whether the statute as construed and applied violates the Fourteenth Amendment presents issues never expressly passed upon by this Court" (page 477).

The case at bar similarly presents an instance of construction and application of the State Labor Relations Act, determined in the face of constitutional objection, never expressly passed upon by this Court.

Petitioners' contention at the moment is not that this Court should reverse the determination reached by the New York courts. It is merely that this substantial question, arising under the Constitution, has never before received the attention of this Court. The ultimate outcome, should the petition be granted, may or may not result in affirmance of the conclusion reached by the New York courts. That does not, it is respectfully urged, dispose of the need for clarification of this issue, particularly as it will affect statutes common to some ten states.

Parenthetically it may be observed, in view of the record fact that this matter was not considered by the

New York Court of Appeals on appeal, but was decided by it by denial of an application for leave to appeal, that nevertheless, such action by that Court was a final determination. *Chicago and Eastern Illinois Railroad Co.* v. *Industrial Commissioner of Illinois, et al.*, 284 U. S. 296, where certiorari was granted after the Supreme Court of Illinois had declined to review.

The test is:

> " * * * whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking of Nebraska, Receiver* v. *Pink*, 317 U. S. 264, at page 268.

The decision herein by the Court of Appeals

> " * * * ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. (Cases cited.) This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of §237 of the Judicial Code, a final judgment reviewable here" (idem, pages 267-8).

That is precisely the situation in the instant case. All that remained to be done after the order of the Court of Appeals was to enter that order as the order of the Supreme Court (R. 1403-4).

Any discussion of the right of free speech, vis-a-vis the requirements of a labor relations act upon employers, must commence with *National Labor Relations Board* v. *Virginia Electric and Power Co.*, 314 U. S. 469. There the Board's complaint charged the employer with having engaged in unfair labor practices within the meaning of §8(1), (2) and (3) of the National Act (29 U. S. C., §158 [1], [2] and [3]). §8(1) is substantially similar to §704 (10) of the New York State Act (*infra*, page 26). §8(3) of the National Act is substantially similar to §704 (5) of the State Act (*infra*, page 26). §8(2) of the National Act is substantially similar to §704(3) of the State Act (*infra*, page 25). No charge based upon this last provision was made against petitioners by the State Board, its Complaint and Findings being limited to §704(4), (5) and (10) (R. 30-1, 1354).

In the case at bar, there was no independent union, and therefore no union contract with the closed shop and check off provisions, as found in the *Virginia Electric* case. Thus, the important element of the employer actively favoring one union, and that an independent one, as against another, as found in the *Virginia Electric* case, accompanied with incidents such as meetings on company premises and on company time, assistance of company supervisors, watching of meetings of the rival union, are here absent.

To be true, it may be urged *contra*, that there is no distinction in principle between acts by an employer favoring one union as against another, and between acts of an employer favoring no union as against union. However, it must be conceded that the actions of an employer that result affirmatively in the establishment of an independent union, always regarded with suspicion, constitute more objective testimony of interference than do mere expressions of opinion by an employer not followed by the establishment of a so-called independent union.

That this was gravamen of the *Virginia* case is shown by the order of the National Board, which, concerned almost entirely with the independent union, required withdrawal of recognition from, and disestablishment of, that organization (case cited, pages 474-5). And see the same case in 319 U. S. 533, at pages 535-7.

However, the holding in the *Virginia Electric* case is of more fundamental significance. This Court therein has apparently resolved with finality whatever basic issue that may have existed between the guarantees of the First Amendment and the obligations of an employer under the National Act.

> "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" (case cited, at p. 477).

This proposition must now be accepted as the last word of this Court in respect of that which is required of an employer under the National Act, vis-a-vis that employer's constitutional right of free speech. There still remains, however, the immediate question of application of the benefit of this rule.

Merely to announce that an employer's right of free speech may not be infringed, while at the same time visit-

ing upon an employer the consequence that follows from adjudging an employer to have violated a statute, affords very little implementation of the right guaranteed to the employer. The "breadth and vigor" with which this rule is applied is the test of its equality. To whittle it away by fastening the rule automatically on to every situation involving alleged anti-union comment by an employer, is to preserve its form, and at the same time destroy its substance.

That this was not the intent of this Court is shown by its denial of certiorari in *National Labor Relations Board v. American Tube Bending Company*, 134 Fed. 2d 993, cert. den. 320 U. S. 768. Thus it becomes important to advert to the facts of the *Virginia Electric* case and to discuss facts parallel in the case at bar, in the light of the holding of this Court in the *Virginia Electric* case, as reported in 314 U. S.

Commenting upon the National Board's finding that the utterances of the employer (in the *Virginia Electric* case) were unfair labor practices, and noting that the National Board had not "raised them to the stature of coercion by reliance on the surrounding circumstances", this Court concluded that it was "not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather, it appears that the Board rested heavily on findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful" (page 479).

In its subsequent disposition of the *Virginia Electric* case, 319 U. S. 533, this Court was satisfied that the hiatus that had impelled the remand had been filled. "These findings and conclusions are not subject to the infirmities of the original ones which prompted our decision in 314 U. S. 469" (319 U. S., at pages 539).

Such "infirmities" however, are present in the case at bar. May it be reiterated that whereas in the *Virginia*

Electric case the Board found in existence a tangible thing, to-wit, the independent union, and upon which it relied entirely (319 U. S., at pages 535-7), nothing akin to that exists at bar. Thus in the *Virginia Electric* case is found this objective fact, and one that bore a direct relationship to the complained of discharges and complained of collection of dues by check-off. The discharges in the *Virginia Electric* case took place during the period that the condemned contract was still in force. All of this is missing at bar.

In the instant proceeding the Board relied upon the discharges (R. 1222), with the same weight that the National Board in the *Virginia Electric* case relied upon the formation of the independent union. But there is a vast difference between the two.

All of the evidence ante-dating January 1st, 1942, upon which the Board here relied to show coercion, restraint and interference, is subject to two fatal infirmities. The Board's own complaint specifically limited restraint, coercion and interference to a period after January 1st, 1942 (R. 29, page 16). While this may be characterized as a formal or procedural objection, the contrary is quite the fact.

Were it not for the erroneous admission of the testimony of comment ante-dating January 1st, 1942, the Board would have had absolutely nothing upon which to find discriminatory discharges during January, 1942. This comment is the only testimony in the record that ante-dates the discharges. Were it excluded, as it should have been under the Board's complaint, the Board would not have been able to attribute the discharges to anti-union bias.

Thus this objection is not merely formal nor procedural, but is substantive. This, then, brings up to the second infirmity, directly pertinent under this Petition.

As the record makes abundantly clear (Petition, pages 12 ff.), all of the testimony relating to incidents ante-dat-

ing January 1st, 1942 was concerned with extraneous happenings and had nothing whatsoever to do with the activities of the union involved.

Indeed, the Board's own star witness, Irving, admitted that this comment was made to customers, was not directed to employees, and that counter-comment by employees was neither contradicted nor criticized (Petition, pages 14-16).

To deny to such expression of opinion the protection of the First Amendment is to emasculate from the rule announced by this Court in the *Virginia Electric* case, any "breadth and vigor" whatsoever. To say, in effect, that an employer may not express an opinion concerning a matter of such public interest as the Gimbel Bros. strike, involving as it did a great business enterprise, located in close propinquity to the place of business of the utterer, and of such proportions that four hundred pickets marched on a picket line, is to muzzle, thoroughly and completely, an employer, and make a mockery of the right of free speech (Petition, page 14).

Particularly is this so when the stark fact emerges that the most exhaustive search of the record fails to show the slightest trace of coercion, even in the most nebulous, subtle or suggestive manner. *A fortiori,* the record shows not the slightest indication, based upon this phase of the testimony, of actual criticism, coercion, restraint or interference.

Petitioners candidly concede that, because of the economic relationship of an employer and an employee, "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequence of incurring that employer's strong displeasure". *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, at page 78.

But at bar there was no "choice between unions". There were no unions involved at all, at the time the comment was made. Not by the widest stretch of the imag-

ination may it be said, on the basis of the record here, that any restraint, coercion or interference, either accompanied or followed the making of that comment, to say naught of discriminatory discharges.

Here was a small retail business, with a small number of employees, and a quite close contact between the employer and the employees, almost continuous during the business day. Customers came and went, and of course a situation as pronounced as the tremendous picket line just across the street became inevitably a topic of talk. All participated in it (Petition, page 15).

According to the Board, any supervisory employee who felt impelled to say anything about that situation, should have whispered it. That is not free speech.

Similar argument is properly addressed to the other extraneous circumstance, out of which came the comment that the Board, by a tremendous leap, fastened on to the employer as a violation of the Act. Quite apart from the fatal time element, this comment sprang out of a strike conducted by a totally unrelated and unconnected union, against a business altogether different from, and not connected with, the employer of the discharged employees (Petition, pages 15, ff.).

Here was a strike, ended by injunction (R. 608), obviously a judicial determination, in the light of the stringest provisions of New York law (Civil Practice Act §876-a) that it was totally unwarranted and unauthorized.

Was the employer involved in that strike thereby deprived of a thoroughly natural and spontaneous reaction? And one free from even hints of restraint or coercion? The Board says yes.

The Board so answered, even though the record again may be searched in vain for the slightest trace or suggestion of coercion, restraint or interference that flowed therefrom, or may be rationally attributed thereto.

This fatal infirmity is not cured, even though the remarks attributed to Sam Marcus on February 3rd, 1942 be accepted in their entirety (R. 1348-9). Fair play impels petitioners at this point to bring to this Court's attention the inclusion by the Board in its Decision (R. 1348-9) of the words "gangsters and racketeers" as having been part of Marcus' remarks, despite the fact that one of the three Board witnesses who testified on this point specifically said that no such characterization was employed (R. 361) and another did not even mention them (R. 705-6).

This incident of February 3rd, 1942 is the first, and only, testimony in the record that connects the employer of the discharged employees, 42nd St. Foto Shop, Inc., with the complaining union. It occurred *after* the discharges (these took place on January 12th and January 23rd, 1942 [R. 1352]).

This is leap frog with a vengeance. By what process of rationalizing, and even assuming that Sam Marcus, on February 3rd, 1942, by his talk, restrained, coerced and interfered with the employees, may the Board attribute the prior discharges to that subsequent act?

The discharges are the only objective, tangible acts found by the Board. Not one iota of testimony was adduced to show that the talk of February 3rd, 1942 had any coercive, restraining or interfering effect whatsoever. Indeed, the very opposite is shown for one of the Board's star witnesses, Hertzel, who testified at length months after the date of the talk (May 6, 1942; R. 255, 328), was a member of the union and was still an employee of 42nd St. Foto Shop, Inc. when he testified (R. 328, 341).

Caught within this dilemma, the Board took refuge in vagueness and generality. The comment of this Court, made concerning the National Board's first decision in the *Virginia Electric* case, as to lack of certainty upon what that Board's conclusion was based, is applicable

here. If the Board here rested upon anything, it rested upon this comment, both before and after January 1st, 1942, and to say the least, the adequacy of that is doubtful.

If it rested upon a whole course of conduct, evidenced in part by these utterances, that does not appear from the Board's decision.

In a recent pronouncement, *Thomas* v. *Collins*, loc. cit., *supra*, this Court has reiterated the rule announced by it in the *Virginia Electric* case:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. * * * Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. * * * But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection" (pages 351-2).

And further:

> "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor altogether, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller

> than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty" (page 354).

And from Justice Jackson's concurring opinion:

> "Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with 'coercion' or 'domination'. Speech of political malcontents is sought to be reached by associating it with some variety of 'sedition'. Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one" (page 356).

A union may conduct its organizational activities in a variety of ways. Here the union chose to do it by an attack upon the employer, which was designed to, and in fact did, reach the public by scattering circulars around.

Was the employer, perforce, to remain silent? The union acted as it did under the guarantees given by the State Act (*infra*, page 25). The only method of reply open to the employer was to reply. That it did. At the worst, it was *"et tu Brute"*.

And in that reply is the employer to be forbidden to discuss the accusations against him, " * * * to turn publicity on the records of the leaders or the unions which seek the confidence of his men", or even " * * * to per-

suade to action with respect to joining or not joining union * * *"?

This Court itself declares that the limit of this right is not passed until " * * * other things are added which bring about coercion, or give it that character", or until " * * * the employer's speech is associated with discriminatory discharges or intimidation, * * *". *Thomas* v. *Collins, ubi supra.*

Upon the record here there was neither coercion nor intimidation, nor aught that gave it that character. Has not the State of New York, then, denied to petitioners the equal protection of its laws?

True, that has not been done by statutory enactment, but mere enactment does not produce life,—a statute is made viable only through application and construction by the courts. In effect, did not the courts of New York say to petitioners, we will allow this union to vilify and criticize you, not only before your employees, but before the public as well, but in reply, you may only say "tsk tsk".

It is no answer to say that the employer may resort to law if it has been libeled. As a practical matter, that is worthless. The time drag alone disposes of it as a means of defense, let alone the numerous other considerations that render such action against an employer of no value (cf. *Truax* v. *Corrigan*, 257 U. S. 312, 331 ff.).

The employer responded in the forum that the union selected, to-wit, the employees. While provocation will not suffice to insulate against an otherwise unlawful act, there was here in abundant measure, both manifest provocation, accompanied by no unlawful act. For, based upon the declarations of this Court, the response becomes unlawful only if accompanied with that, which, by application of reasoning, may clearly be denominated as coercion or intimidation. The employees were told that they could do as they pleased. In fact, so they did, and further in fact, nothing whatsoever appears in the record, indicating any

actual or implied

act by the employer, showing
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lent of the National Act (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 at pp. 222, 3)". *Matter of Davega-City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, at pages 21-2.

If petitioners' contentions be sound, then it is clear that the courts of New York have decided a Federal question in a manner inconsistent with the holdings of this Court.

It would unduly extend this argument to include herein extracts from the letter and speech sent and made by the employer (in the *American Tube Bending* case) on the very eve of an ordered election, a factor, incidentally, altogether missing in the proceeding at bar.

The employees were given the alternative of choice between having a union represent them or "whether you want to continue as we have been doing, discussing your own matters individually" (page 996); they were told that under the existent regime "each of you can have a sympathetic hearing for your own personal problems, and adjustments made that are fair all around" (*idem*); they were asked concerning the "kind of leadership" to which they were going to entrust their future. whether it is open, above board and dependable (*idem*); they were told that the company maintained "an open shop in a true sense of the word" (page 997); they were informed that instead of flexible wage rates permitting "as many as four increases in a year", under a collective bargaining contract wage rates tend to be established for a year, which "may interfere with the recognition of improvement" (*idem*); they were told that if they have someone represent them, they have got "to pay for that representation" (*idem*); to them was posed the question, who are these strangers who have "all of a sudden become so interested in your welfare"; and then the final question put, "Is your status under my leadership something that you can improve by choosing someone else for your leader?" (page 998).

Unquestionably, the language used by the president of the *American Tube Bending Co.* was more carefully selected and thought out, and more happily phrased than that employed by Marcus. That was undoubtedly due to Marcus' spur of the moment reaction, for his talk followed close upon the distribution of the offensive and vilifying circular. But if substance is to be regarded, rather than form, and certainly in a matter as grave as this, substance should be looked at, there is a great deal of similarity of thought between what Marcus said and what the *American Tube Bending Co.* wrote and said. Nevertheless, the Circuit Court unanimously was of opinion that the comment fell well within the privilege afforded by the First Amendment.

More recently, the Third Circuit considered this same proposition in *Budd Mfg. Co.* v. *National Labor Relations Board,* 142 Fed. 2d 922. There a petition for an order adjudging the *Budd Co.* and its president, individually, guilty of contempt, was dismissed.

A preliminary observation is pertinent. A distinction may be sought between the proceeding at bar and the *Budd Mfg. Co.* case, on the ground that the latter, being a contempt proceeding, contemplated the imposition of penal sanctions on the alleged offender, whereas in the case at bar, an unfair labor practice was sought merely to be abated. No such distinction lies. If the holdings of the New York courts be sustained, petitioners ultimately will face the alternative either of compliance, or of a contempt proceeding to enforce compliance. Thus, in respect of this phase, there is no substantive difference,—consequently what was said in the *Budd Mfg. Co.* case is pertinent here.

In the *Budd Mfg. Co.* case a letter and circular were involved. The letter, written after the denial by this Court of certiorari to review the previous order made by the Circuit Court directing enforcement of the National Board's order (138 Fed. 2d 86, cert. den. 321 U. S. 778)

informed the employees that they might have no union, affiliate with an outside union, or form an independent union (page 930).

The *Budd* case is even stronger than the case at bar, for here there is no independent union nor even the assertion that the union involved at any time represented the employees or claimed such representation.

The enclosure with the letter pointed out that "there has been 10 years of industrial peace in our plants" (page 931), that it is not necessary for an employee "to join any particular labor organization, in spite of anything he may be told to the contrary" (*idem*), that the company would recognize an independent union (*idem*), that in choosing between an outside union and one of their "own", the employees must determine "which form of representation will be better for you as an employee of this Company, and which one will be more likely to enable your Company to operate most efficiently and continue to be able to pay you the highest wages" (*idem*), and then posed questions, such as:

> "To what kind of leadership are you going to entrust your future with this Company? Is it unselfish leadership, or is it not? Is it interested in your personal, individual welfare, or is it self-seeking? If an outside organization, on the basis of its past record is it open and above board and dependable, or don't you know?" (*idem*).

In dismissing the petition, the Circuit Court wrote:

> "On the record now before us, it is our opinion that the expressions contained in the letter of enclosure, standing alone as they indisputably do, are privileged and that the privilege was not lost through any threat or act of discrimination, coercion or intimidation by either of the respondents in

violation of the employees' rights under the Act" (p. 929).

In the case at bar, it is the comment of the employer, "standing alone", which constitutes the entire basis of the State Board's order. Only tortuous reasoning can connect that comment with the single objective fact found by the State Board, to-wit, the discharges.

The Circuit Court answered in the negative the question "whether the words used are used in such circumstances and are of such a nature as to create a fear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (page 927).

At bar, even one of the Board's witnesses testified that Marcus said "he did mention about he didn't mind us organizing" (R. 705), although the Board, in its summary (R. 1348-9), did not include that. As already mentioned, Marcus might have phrased his comment in finer fashion, but there can be no gainsaying that the substantive effect of what he said is not dissimilar from the language approved by the Circuit Court, approval given by a court that had decided otherwise in a case involving the same fundamental proposition, *National Labor Relations Board* v. *New Era Die Co. Inc.*, 118 Fed. 2d 500, 505.

Without further citation, the Court is respectfully referred to the reasoning of the Circuit Court (case cited, (pages 926-7). Petitioners urge that what is there said is determinative at bar.

In *National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. 2d 905, cert. den. 312 U. S. 689, the Circuit Court for the Seventh Circuit considered at length this basic issue of an employer's right of comment. That part of the order of the National Board which forbade dissemination of propaganda by the company among its employees, was set aside (page 916). The company's publications were in some respects stronger than the utterances at bar. In its "Viewpoint on Labor", the company wrote:

> "But, now along comes another group that says: 'There are 100,000 jobs out at Ford's. If you want one of them, pay us a registration fee, and so much every month, and we will pass you in, and you can work as long as you pay us * * * If you go into a union, they have got you, but what have you got? * * * If the union leaders are sincere, they should go into business themselves" (footnote 1, page 913).

Under the heading of "Fordisms", the company wrote:

> "Our men ought to consider whether it is necessary for them to Pay Some Outsider Every Month for the Privilege of Working at Ford's. What was the result of these strikes—merely that numbers of men put their necks into an Iron Collar. I'm only Trying to Show Who Owns the Collar" (idem, p. 914).

In taking up the constitutional contention of the *Ford Company*, the Circuit Court discussed that issue on the same fundamental basis that petitioners here urge upon this Court. Beginning with the premise that "nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment", and addressing itself to the argument of the National Board, that these are "qualified and not absolute" rights, and that the employer's expressions were "set against a background of publicity declared opposition by Mr. Ford to the unionization of his plant", and recognizing the ease with which employer influence may become undue, the Circuit Court wrote:

> "This holds the employer forever suspect and in practical application must necessarily silence him whose opinion may be the best informed, no matter how honestly his views may be entertained, or how truthful may be his observations. If the concept

> that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied" (page 914).

Petitioners can say no more. Many indeed are the cases in which the constitutional guarantees have been invoked by an employer found by the National Board to have violated the National Act.[1] There is no case involving a state labor relations act. The reported cases, of course, vary in respect of their factual situation and therefore cannot be of precise authority at bar.[2] But, as aptly phrased by Justice Jackson,

> "If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one." *Thomas* v. *Collins* (*loc. cit. supra*, page 356).

Nowhere has it been held that this Court is barred, under the statutory provision making findings of fact by

---

1. To note but a few: *NLRB* v. *Laister-Kaufman Aircraft Corp.*, 144 Fed. 2d 9, *Elastic Stop Nut Corp.* v. *NLRB*, 142 Fed. 2d 371, cert. den. 322 U. S. IX; *Jacksonville Paper Co.* v. *NLRB*, 137 Fed. 2d 148, cert. den. 320 U. S. 772, *NLRB* v. *Pick Mfg. Co.*, 135 Fed. 2d 329, *NLRB* v. *Trojan Powder Co.*, 135 Fed. 2d 337, cert. den. 320 U. S. 768, *NLRB* v. *Sunbeam Electric Mfg. Co.*, 133 Fed. 2d 856, *NLRB* v. *Schaefer-Hitchcock Co.*, 131 Fed. 2d 1004, *NLRB* v. *Sunshine Mining Co.*, 110 Fed. 2d 780, cert. den. 312 U. S. 678.

2. Apropos of the stress laid by the State Board on the comment by Marcus referring to junior employees, *NLRB* v. *Citizen-News Co.*, 134 Fed. 2d 962, 965, is of interest.

the Board conclusive, if supported by evidence, from inquiring into the application of a constitutional guarantee. To do that would be to make an empty bubble of judicial review and oust this Court from the discharge of its highest function, the vigorous protection of these basic rights of the citizens of this country.

Conclusion.

In this petition asking for review by this Court, petitioners urge:

First: This Court has not yet considered a case involving the constitutional guarantees of free speech and equal protection of the laws, arising out of the enforcement of a state labor relations act, and particularly the Act of the State of New York.

Second: The record at bar discloses clearly that the State Board has not, within the purview of the criticism voiced by this Court in *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 314 U. S. 469, clearly indicated the basis of its decision.

Third: To the extent that the State Board relied on the utterances condemned by it, the affirmance thereof by the courts below violated petitioners' constitutional guarantees, on the ground that such utterances are protected and privileged.

Fourth: The utterances condemned below fall within the area of comment declared by this Court to be protected, devoid as they are, by explicit wording, by act, by association, or by implication, of that coercion and intimidation declared by this Court to remove such utterances beyond the area of privilege.

Sol. A. Herzog,
Attorney for Petitioners.

April, 1945.

APPENDIX.

New York State Labor Relations Act (Pertinent Provisions).

§701. Definitions.

When used in this article:

* * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

* * * * *

§703. Rights of Employees.

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section. Added L. 1937, c. 433, §1; amended L. 1940, c. 773, eff. April 26, 1940.

§704. Unfair Labor Practices.

It shall be an unfair labor practice for an employer:

* * * * *

4. To require an employee or one seeking employment, as a condition of employment, to join any company union

or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

* * * * *

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three. Added L. 1937, c. 443, §1, eff. July 1, 1937.

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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(33)

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1216

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

On Petition for Certiorari

BRIEF FOR NEW YORK STATE LABOR RELATIONS BOARD IN OPPOSITION TO PETITION

WILLIAM E. GRADY, JR.,
General Counsel,

PHILIP FELDBLUM,
Associate General Counsel,
New York State Labor Relations Board.

JUDICIAL PRINTING CO., INC., 62 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 132

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IN THE

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No. 1216

42ND ST. SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

On Petition for Certiorari

BRIEF FOR NEW YORK STATE LABOR RELATIONS BOARD IN OPPOSITION TO PETITION

Opinions Below

The decision and order of the New York State Labor Relations Board (hereinafter referred to as the Board) is reported in 5 S. L. R. B. (N. Y.) 1350 (R. pp. 1329-1358). The decision of the Special Term, Supreme Court of the State of New York, New York County, denying petitioners' motion to vacate the Board's order, is not officially reported and appeared in the New York Law Journal (Vol. 109, No. 130, June 5, 1943).

The decision of the Appellate Division, First Judicial Department, affirming the order made at Special Term, is reported at 268 App. Div. 759 (case 4). The decision of the Appellate Division, denying petitioners' motion for

leave to appeal to the Court of Appeals, is reported at 268 App. Div. 849 (case 6). The decision of the Court of Appeals of the State of New York, denying petitioners' motion for leave to appeal to it, is reported in 293 N. Y. (Weekly Advance Sheet No. 297, Jan. 6, 1945, p. i).

No opinions were written by any of the courts below, except for the memorandum contained in the short form order made at Special Term (R. 4).

Jurisdiction

Jurisdiction to entertain this petition is claimed under the Judicial Code, Section 237(a) amended (28 U. S. C., Sec. 344).

Question Presented

The question presented is whether an order of the Board, directing petitioners to cease and desist from interfering with, restraining and coercing their employees in violation of the provisions of the New York State Labor Relations Act, contravenes the constitutional right of free speech.

Constitutional and Statutory Provisions Involved

The relevant portions of the Constitution of the United States are set forth in the Appendix to petitioners' brief, page 26.

The sections of the New York State Labor Relations Act involved, are:

> Sections 701 (2), 703, 704 (4), (5) and (10), set forth in the Appendix to petitioners' brief, pages 25-6.
>
> Sections 706, 707 (1), (2), (3) and (4), set forth in the Appendix to this brief, pages 21 to 25.

Statement

The Board is a duly constituted administrative agency of the State of New York. It operates pursuant to the New York State Labor Relations Act, Article 20 of the Labor Law of the State of New York, hereinafter called the Act. The Act is patterned on, and similar to, the National Labor Relations Act.

Proceedings Before the Board

The unfair labor practice proceeding before the Board, here involved, followed the course prescribed by Section 706 of the Act (Appendix, pp. 21 to 23), that is, complaint, notice of hearing, answer, hearings before a Trial Examiner with full opportunity to offer evidence, examine and cross examine witnesses, issuance of Trial Examiner's Intermediate Report, exceptions filed thereto, argument before the Board, and issuance of the Board's decision containing a discussion of the evidence, findings of fact, conclusions of law and order.

The Board's order, dated December 30, 1942 (R. 1329-1358), in substance, directed petitioners to offer reinstatement to, and make whole, two employees discharged because of their union activities, and to cease and desist from interfering with, restraining and coercing their employees in the exercise of their rights to join and assist a labor organization of their own choosing.

Proceedings in the Courts

Pursuant to Section 707 of the Act (Appendix, pp. 23 to 25), petitioners applied at Special Term of the Supreme Court of the State of New York for an order vacating the Board's order. At the same time the Board applied for an order of the Court enforcing the Board's order.

On June 4, 1943, an order was duly made by the Supreme Court of the State of New York, County of New York, denying petitioners' motion to vacate the Board's order.

On August 18, 1943, an order was duly made by the Supreme Court, New York County, enforcing the Board's order, in whole. *No appeal has been taken from this order and the order remains outstanding and unappealed.*

Petitioners appealed from the order dated June 4, 1943, which denied their motion to vacate the Board's order. The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirmed the order (268 App. Div. 759). The Appellate Division thereafter denied an application by petitioners for leave to appeal to the Court of Appeals (268 App. Div. 849). A similar motion by the petitioners was also denied by the Court of Appeals itself (293 N. Y. ——; Advance Sheet #297, Jan. 6, 1945, p. i).

Summary of Argument

I

Petitioners seek a writ of certiorari to review an order of the Supreme Court, New York County, entered upon the remittitur of the Court of Appeals of the State of New York, *denying leave to appeal to the Court of Appeals.* Petitioners' specification of errors charges the alleged errors to the Court of Appeals.

The Appellate Division, First Judicial Department, was the highest court in the State of New York which adjudicated the merits of the controversy here involved. The Court of Appeals merely denied a motion by petitioners for leave to appeal.

The writ which petitioners seek, therefore, is directed to the wrong court, and the errors which they specify are charged to the wrong court.

II

The record herein discloses petitioners' intense hostility to unions, discharge of employees for union activities, and utterances which were coercive, inherently and in context. The Board's order, based "on the entire record" (R. 1351, fol. 4052) does not contravene petitioners' right of free speech. That right may not be used as a shield for coercive action in violation of the Act.

The fact that the order which petitioners seek to review was made by a state labor relations board rather than by the National Labor Relations Board, raises no novel question.

POINT I

The petition should be dismissed, for it seeks a writ directed to, and charges errors to, a court which has not adjudicated the merits of the controversy.

Petitioners herein pray "that a writ of certiorari issue to review the final order entered on December 8th, 1944 (R. 1403-4), upon the Remittitur of the Court of Appeals, the highest court of the State of New York (R. 1402), *denying leave to appeal to the Court of Appeals,* from an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on June 8th, 1943 (R. 4), denying petitioners' application to vacate and set aside the Decision and Order of the New York State Labor Relations Board dated December 31st, 1942 (R. 1329-59)" (Petition, pp. 2-3) (italics ours).

Petitioners' Specification of Errors (Petition, p. 30) is based on the ground that "the Court of Appeals of the State of New York erred: * * *."

It is respectfully submitted that the Court of Appeals of the State of New York did not adjudicate the merits of this case, but merely denied an application by petitioners for leave to appeal, and, accordingly, that the writ of certiorari which petitioners seek is addressed to the wrong court and the petition should be dismissed.

The Board's order herein was issued on December 31, 1942. Thereafter, pursuant to Section 707 of the Act, petitioners instituted court proceedings to vacate and set aside the Board's order. The Board, simultaneously, instituted court proceedings for enforcement of its order.

On June 4, 1943, an order was duly made by the Supreme Court of the State of New York, County of New York, denying petitioners' motion to vacate the Board's order. On August 18, 1943, an order was duly made by the same court, enforcing the Board's order in whole.

Petitioners appealed only from the order dated June 4, 1943, which denied their motion to vacate the Board's order. No appeal was taken from the order of August 18, 1943, enforcing the Board's order, and said order remains an outstanding, unappealed final order.

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirmed the order of June 4, 1943, denying petitioners' motion to vacate the Board's order. Petitioners' motions for leave to appeal were denied by the Appellate Division on June 9, 1944, and by the Court of Appeals on November 30, 1944. On December 8, 1944, an order was entered in the Supreme Court, New York County, on remittitur from the Court of Appeals, making the order of the Court of Appeals, denying leave to appeal thereto, the order of the Supreme Court, New York County.

Wholly apart from the fact that the final order of the Supreme Court, New York County, dated August 18, 1944, enforcing the Board's order, is outstanding and unappealed, it is clear that the petition herein is based on erroneous procedure and that the writ sought is not directed to the proper court.

The Court of Appeals' only act was to deny petitioners' motion for leave to appeal. The order of the Supreme Court, New York County, dated December 8, 1944, which petitioners term a "final order," was for the purpose of taxing costs. It was merely a ministerial act of the lower court following denial of leave to appeal by the Court of Appeals (*Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264).

The highest court of the State of New York which has adjudicated the merits of the controversy is the Appellate Division of the Supreme Court of the State of New York, and it is to that court that the writ of certiorari should have been directed. This error in the petition is fatal and requires its dismissal.[1]

Moreover, petitioners' Specification of Errors relates to alleged errors committed by the Court of Appeals and speaks of the "holding, in effect by affirmance * * *" of that court. As we have pointed out, however, the Court of Appeals did not affirm the order of the Appellate Division, but merely denied leave to appeal. The alleged errors which petitioners seek to review, therefore, are not imputable to the Court of Appeals, but only to the Appellate Division, the highest State court which adjudicated the

---

1. *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Second National Bank* v. *First National Bank*, 242 U. S. 600; *Cuyahoga River Power Co.* v. *Northern River Realty Co.*, 244 U. S. 300; *Chicago and Eastern Illinois R.R. Co.* v. *Industrial Commission*, 284 U. S. 296; *Missouri Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 529; *Bacon* v. *State of Texas*, 163 U. S. 207; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 251; *Randall* v. *Board of Commissioners etc.*, 261 U. S. 252.

merits of the controversy. This deficient assignment of errors by petitioners constitutes additional ground for dismissal of the petition.[2]

It is respectfully submitted, therefore, that the petition herein should be dismissed on the grounds (a) the petition seeks a writ addressed to a court which has not adjudicated the merits of the case, (b) it seeks review of an order denying leave to appeal, which order is not appealable, and (c) is based on a Specification of Errors which is not only lacking in certainty and definiteness, but which is erroneously charged to the wrong court.

POINT II

The petition should be denied, for no novel or even substantial question is presented.

Section 704, subdivision 10 of the New York State Labor Relations Act provides that it shall be an unfair labor practice for an employer to "interfere with, restrain or coerce employees" in the exercise of the rights guaranteed by Section 703 of the Act. The rights guaranteed by Section 703 are: "* * * to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, * * *."

The Board found, and the courts below have sustained the finding, that petitioners "interfered with, restrained and coerced their employees in the exercise of the rights guaranteed by the Act" (R. 1353).

The Board also found, and this finding too has been sustained by the courts below, that petitioners unlawfully dis-

2. *Local #167, International Brotherhood etc.* v. *U. S.*, 291 U. S. 293; *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86.

charged two employees, Jay Irving and Edwin R. Cohen, in violation of Section 704, subdivisions 4 and 5 of the Act (R. 1353).

The Board accordingly directed petitioners to cease interfering with their employees' exercise of their rights under the Act and to offer reinstatement to, and make whole, the two discharged employees upon their return to civilian life (R. 1355-7).

We shall recount the facts briefly and then show that under well settled law the right of free speech does not excuse the coercive actions of petitioners.

THE FACTS

By way of preliminary, we respectfully remind the Court that an employer's antipathy to unions and the existence of other unfair labor practices, prior or concurrent, are properly to be considered in determining whether the Act has been violated. As this Court said in *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 587, 588:

> "The employer's attitude towards unions is relevant."

Petitioner Sam Marcus, in addition to doing business as Marcus Photo Service and as Fotoshop, is president of 42nd St. Foto Shop, Inc. and Fotoshop, Incorporated. He owns and controls all the petitioners' enterprises (R. 736, 737). The Board found that "all these undertakings constitute one single enterprise responsible for compliance with the Act" (R. 1336).

Background

The record contains uncontradicted testimony that Marcus and his wife, who took an active part in management, were intensely hostile to unions. They and supervisory employees made numerous remarks calculated to dis-

courage self-organization among their employees. A few illustrations follow.

Mrs. Marcus told the employees: "Unions seem to be created for the purpose of annoying employers" (R. 572). During a strike at Gimbel's Department Store, she said that "she made it a point of going into Gimbel's every day just to walk through, whether she bought anything or not, just to show the pickets" (R. 422). Irving, one of the discharged employees, testified that when Marcus hired him he said "his employees could always come to him with their problems and there is no necessity of going to unions, and his employees don't believe in unions" (R. 663).

Irving testified that during a strike of photo finishers at the Marcus Photo Service in the fall of 1941, Marcus called the striking employees "a bunch of ingrates who didn't know when they were well off and that it was unfortunate that they will have to lose their jobs because of being misguided by a racketeering union" (R. 429). Mrs. Marcus and Andorn, her brother, who was head of the camera department, made similar comments (R. 428).

During the 1941 strike Irving was asked to sign a statement that the employees had no desire to join the striking union (R. 431). The statement referred to that union in derogatory terms (R. 431-2). About the same time a leaflet, purportedly prepared by the employees but actually prepared by the management, was distributed to customers (R. 435). It contained the following paragraph (Bd.'s Exh. 10, printed, R. 1194-5, offered R. 442):

> "We are emphatic in our desires to remain free men and not being enslaved by union racketeers. We have personally, and of our own volition, petitioned our employers not to sign our liberties away to this union *or any other union.* This arrogant attempt of racketeers to muscle-in on our pay envelopes is a direct attack on our liberties and livelihood, even more so than on our employers" (Bd.'s Exh. 10, fol. 3581). (Italics ours.)

Neither Marcus nor his wife, nor any supervisory official took the stand to deny the foregoing.

The Unfair Labor Practices

In the early part of January, 1942, Retail Employees Union, Local 830, C. I. O., herein called the Union, started to organize petitioners' employees. Two employees, Irving and Cohen, were among the first to join the Union and most active in its organizational drive. Irving was discharged on January 12, 1942, and Cohen on January 23, 1942. The Board found, and the courts below have sustained the finding, that both Irving and Cohen were discharged because they had joined and assisted the Union (R. 1353).

On January 24, 1942, the day following the discharge of Irving, Kaplan, the manager, asked Bordin, one of the employees, whether he was "involved in unionization" and advised him to "have nothing to do with the foolish kids who are trying to unionize the Foto Shops," and to keep his "nose clean" (R. 693-5). Two days later Kaplan said to Bordin: "Say, Bob, are you keeping your nose clean?" and asked Bordin who had given him the Union application card: "Was it anybody who is working there, or was it Irving or Cohen?" (R. 698-700).

As part of the organizing campaign among petitioners' employees, the Union, on February 2, 1942, distributed a leaflet to recruit new members (Bd.'s Exh. 9, printed, R. 1192-3, offered, R. 299). The very next day, Marcus called a meeting of the employees, about forty or fifty in number, and made a speech[3] in which he called the Union "a bunch of racketeers and gangsters." He threatened to discharge

3. Petitioners advert to the fact that the witness Rafalow was an "atheist," and, although no federal issue is involved and no error specified, apparently question the value of his testimony as to the speech made by petitioner Marcus. Rafalow's testimony was fully corroborated by two other witnesses (R. 332-6, 701-6). The testimony of all three was uncontroverted. Peti-

the younger employees if the Union obtained a collective bargaining contract and warned the older employees that this would mean additional work for them. He suggested that the employees abandon the "outside" union and form a company union. "Why give your money to outside crooks, have a union among yourselves" (R. 259-261, 332-6, 706, 1189-91).

Bordin, one of the employees, testified that early in February, 1942, Marcus had told him that "I should have nothing to do with unions and I could advance myself like Mr. Hervich has" and that Irving had been let go because of union activity (R. 708).

Marcus did not testify.

Petitioners at page 29 of their petition make much of the fact that the witness Rafalow testified that Marcus in his speech had characterized the Union as "a bunch of racketeers and gangsters" and that those exact words are not to be found in a statement which Rafalow made a few days after the meeting at which Marcus spoke (Bd.'s Exh. 8 for Iden.). The statement, however, does contain the following (R. 1190):

> "Mr. Marcus then went on to say: 'Why give your money to outside crooks, have a union among yourselves.' He also said: 'I have nothing against unions, but I don't like to see you giving money to racketeers.'"

The statement also quotes Marcus as having said (R. 1191):

> "Of course, I have no right to discriminate against anyone in the union. That's what the leaflet says the law is. I don't fire anyone for being a member of the union. I fire them because of inefficiency."

---

tioner Marcus did not testify. Actually, Rafalow, who was eighteen years old, did not know the meaning of the term "atheist" and incorrectly applied it to himself. At most he was an agnostic (R. 320-2). In any event, he was "first duly sworn" on taking the witness stand (R. 255) and knew the penalties for perjury (R. 320). His testimony was clearly competent and admissible (*N. Y. State Constitution*, Article I, Sec. 3; *N. Y. Civil Practice Act*, Sec. 362; *O'Reilly* v. *People*, 86 N. Y. 154, 159; *Bookman* v. *City of New York*, 200 N. Y. 53, 56; *Brink* v. *Stratton*, 176 N. Y. 150, 157-8; *Peo.* v. *Most*, 128 N. Y. 108; *Wigmore on Evidence*, Vol. 6, p. 327).

On the basis of the entire record, the Board found, and its findings were upheld by the courts below, that petitioners had interfered with, restrained and coerced their employees in the exercise of their right to join or assist a union of their own choosing. The Board's findings of fact were supported by substantial evidence and, therefore, are conclusive.[4]

FREE SPEECH

Petitioners' invocation of the important right of free speech, in an attempt to excuse their interference with their employees' rights, is without merit.

The controlling precedent is the decision of this Court in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469. In that case the National Labor Relations Board found that the employer had interfered with, restrained and coerced its employees in violation of the National Act. Although the employer had engaged in many anti-union acts, the National Board's decision did not indicate whether its finding of interference was based on the whole "complex" of the employer's activities, or whether the finding was based solely on certain statements. As there were grave doubts as to whether the statements, standing alone, were coercive (314 U. S. at 476, 479), this Court remanded the matter for clarification by the National Board.[5]

In the *Virginia Electric* case, this Court stated (p. 477):

> "* * * If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint, or coercion, *pressure*

4. Act, Section 707(2); *Stork Restaurant, Inc.* v. *Boland*, 282 N. Y. 256.

5. The National Board, after the remand, reissued its order without taking further evidence and stated that its finding of interference was based on the employer's conduct, as well as on the statements. That order (44 N. L. R. B. 404) was enforced by the Circuit Court of Appeals (133 F. (2d) 390) and by this Court (319 U. S. 533).

exerted vocally by the employer may no more be disregarded than pressure exerted in other ways.

"If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for 'messing with the C.I.O.,' the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative powers. *In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done.*" (Italics ours.)

Petitioners' reliance on *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993, 2nd Cir., cert. den. 320 U. S. 768, is misplaced, for there the situation was wholly different from that at bar. In that case there was no anti-union background, no discriminatory discharges and no coercion or intimidation of employees. All that was involved was a letter and a speech made to the employees by the president of the company. These related to a pending election in which the employees were to choose between two unions. The Circuit Court of Appeals pointed out that (134 F. (2d) 995):

"* * * there is no intimation of reprisal against those who thought otherwise; quite the opposite. The

> most that can be gathered from them [the letter and the speech] was an argument, temperate in form, that a union would be against the employees' interest as well as against the employers', and that the continued prosperity of the company depended on going on as they had been."

On the same day that this Court denied certiorari in the *American Tube Bending* case, this Court also denied certiorari in *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. (2d) 337, 3rd Cir. In the *Trojan Powder* case the employer had written a series of letters to its employees, which, as the Circuit Court of Appeals said (135 F. (2d) at 339), contained "no threats" and were "not unusual," in that the company had customarily written letters to its employees. The Court, however, went on to point out (p. 339) that a company foreman had characterized union representatives as "saboteurs" (c.f. the use of "gangsters" and "racketeers" in the case at bar) and, citing the decision of this Court in the *Virginia Electric* case, upheld the Board's order. This Court, as we have said, denied certiorari (320 U. S. 768).

In *N. L. R. B.* v. *M. E. Blatt Co.*, 143 F. (2d) 268, cert. den. U. S. , 89 L. Ed. Adv. Op. 90, the Circuit Court of Appeals, 3rd Circuit, discussing the opinions in the *Virginia Electric* and *American Tube Bending* cases, said (p. 274):

> "We are of the opinion that the Supreme Court intended to indicate and did indicate that communications from the employer to the employee might amount to coercion, but that it was not clear that the Board had found the existence of coercion on sufficient evidence in the cited case. The guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal actions. This is the substance of our ruling in National Labor Relations Board v. New Era Die Co., 118 F. 2d 500, 505. We reiterated it in the recent contempt proceeding of Edward G. Budd Manufacturing Co. v. National Labor Relations Board, 142 F. 2d 922."

In the *Budd* case, which was a contempt proceeding, cited in the above quotation, the Court pointed out (142 F. (2d) at 927):

> "Whether the constitutionally protected right of free speech has been abused by an expression of fact or opinion, so as to render the matter actionable as a violation of the Wagner Act, comes down to the question whether the assailed utterances constitute, or are in furtherance of, employer domination, coercion or interference in his employees' exercise of their legal rights. The inquiry, therefore, in any relevant connection is whether the challenged statements or opinions contain, or, in the circumstances, can reasonably be construed as containing, threats by the employer of discrimination or other coercive or intimidating action against some employees or an allurement of favoritism to others according to their respective labor affiliations or activities. If the utterances do so offend, then they are actionable, for the Wagner Act is aimed directly at such conduct and furnishes the effective means for its eradication."

Similarly, in *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 8th Cir., 142 F. (2d) 371, it was said (p. 378):

> "As to petitioner's argument concerning constitutional privilege. Valnoski's remarks related to petitioner's determination to establish the kind of labor organization it desired—an independent organization, and while an expression of opinion on labor matters may be protected when such utterances do not constitute coercion under the Act, speech amounting, in connection with other circumstances, to coercion within the meaning of the Act is not protected. * * * The determination of the category into which the remarks fell was a question of fact for the Board, National Labor Relations Board v. Virginia Power & Electric Co., supra, and the Board's finding on the fact may not be disturbed."

Again, in *N. L. R. B.* v. *Laister-Kauffmann A. Corp.*, 8th Cir., 144 F. (2d) 9, the Court declared (pp. 12-13):

> "Under the facts and circumstances and the inferences to be drawn therefrom the Board was within its rights in concluding under the evidence that respondent had engaged in unfair labor practices in violation of Section 8(1) of the Act. The acts and conduct of respondent present a pattern expressive of management hostility to the rights of its employees to choose their labor affiliations independently of management interference; and respondent's attempts to discourage the employees from affiliating with the Union by statement evincing hostility to the Union, veiled threats of discharge, warnings that the plant would shut down because of the Union and interrogation of employees concerning Union affiliation and activities constitute well recognized forms of interference, restraint, and coercion, in violation of Section 8(1) of the Act."

Thus, it is well established that "the right of 'free speech' cannot be invoked as a shield for coercion in violation of the Act."[6] Indeed, the very cases cited by petitioners so hold.[7]

In the cases at bar, the "complex of activities" revealed by the record herein, amply supports the finding of the Board, affirmed by the courts below, that petitioners have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them by Section 703 of the Act. That finding is based upon largely undenied and uncontraverted testimony as to a long-established anti-union attitude on the part of the petitioners, the unlawful discharges of two employees because of their union activities, the conduct of petitioners in warning employees not to join or assist the Union, thinly veiled threats of discharges if the Union's organizational drive were successful,

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6. *N. L. R. B.* v. *Glenn L. Martin-Nebraska Co.*, 141 F. (2d) 371, 373.

7. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 478; *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993, 994; *Edward G. Budd Mfg. Co.* v. *N. L. R. B.*, 142 F. (2d) 922, 926; *Thomas* v. *Collins*, ... U. S. ..., 89 L. Ed. Adv. Op. 340, 352.

petitioners' suggestion that a company union be formed, and vilification of the Union and its representatives.[8]

Indeed, the remarks made by Marcus and Kaplan, petitioner's manager, were inherently coercive and an interference with the rights of the employees. Marcus' threat to discharge younger employees if the Union were successful, his characterization of the Union as "a bunch of racketeers and gangsters,"[9] his remark, "Why give your money to outside crooks?" and his suggested formation of a company union go far beyond a temperate expression of opinion, such as in *N. L. R. B.* v. *American Tube Bending Co.*, *supra*. Manager Kaplan's warning to an employee to "have nothing to do with the foolish kids who are trying to unionize Foto Shops" and to keep his "nose clean" was more than mere advice. And petitioner Marcus' statement to Bordin that "[he] should have nothing to do with unions and [he] could advance [himself] like Mr. Hervich has" was an obvious attempt to induce Bordin to renounce the Union under promise of future favor.

Petitioners' statements, therefore, clearly contained "threats by the employer of discrimination or other coercive or intimidating action against some employees or an allurement of favoritism to others, according to their respective labor affiliations or activities,"[10] and were not protected by the constitutional privilege of free speech.

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8. Petitioners infer that a circular distributed by the Union vilified and libelled them (petition, p. 18; brief, p. 16). Examination of that circular (Board's Exh. 9, R. 1192) will disclose that petitioners' characterization thereof is wholly without basis. The circular was temperate and factual in character. Petitioners made no attempt to prove that it was false. Their present attempt to justify their coercive remarks as a reply to vilification and libel by the Union is an unwarranted afterthought, not raised before the Board (petitioners' exceptions to Intermediate Report of Trial Examiner, R. 1271-1281).

9. Cf. *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. (2d) 337, 339 (union representatives "sabateurs"); *Oughton* v. *N. L. R. B.*, 118 F. (2d) 486, 489, cert. den. 315 U. S. 797 (union "a bunch of communists and reds"); *N. L. R. B.* v. *N. Carolina Finishing Co.*, 121 F. (2d) 954, 955 (union "a bunch of racketeers"); *N. L. R. B.* v. *Jahn & Ollier Engrav. Co.*, 123 F. (2d) 589, 591 (union officials "don't want you, but want your dues"; be wary of "poison peddlers" and "poison propaganda"; union employees "smart agitators").

10. *E. G. Budd Co.* v. *N. L. R. B.*, 142 F. (2d) 922 at 927.

NO NOVEL OR SUBSTANTIAL QUESTION

That the order which petitioners herein seek to review was made by the New York State Labor Relations Board, and not by the National Labor Relations Board, does not make the question presented novel. The New York State Labor Relations Act and the National Labor Relations Act "are not only alike in their provisions but are almost identical in language," and, hence, Federal decisions are in point and entitled to "great weight."[11] The constitutional right of free speech, of course, is equally applicable to decisions of State Boards, and the decisions of this Court are binding on such Boards. As the New York and National Labor Relations Act are "almost identical in language," the questions which petitioners seek to present are in no respect novel and are fully covered by decisions of this Court.

The pattern of events at bar contains undenied expressions of hostility towards unions, discharge of two employees because they applied for membership in and assisted the Union, and undenied and substantially conceded utterances, which were not only coercive in themselves but were part of a whole pattern of activity designed to discourage and prevent the employees from exercising their right to join a union of their own choosing.

Not one of the cases on which petitioners rely holds that the right of free speech makes such utterances or such conduct on the part of an employer any the less interference with employee rights in violation of the Act.

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11. *Davega City Radio, etc.* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 22; *Stork Restaurant* v. *Boland*, 282 N. Y. 256, 267; *N. Y. S. L. R. B.* v. *Timen*, 264 App. Div. 120, 122.

Conclusion

The Board's finding, based "on the entire record" (R. 1351), that petitioners interfered with, restrained and coerced their employees in violation of the provisions of the New York State Labor Relations Act, and the order issued thereon, do not infringe upon the petitioners' right of free speech.

We respectfully submit that on the record herein, not only is there no novel question of law presented, but petitioners fail to present any question of substance whatever.

Respectfully submitted,

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May, 1945.

APPENDIX

New York State Labor Relations Act, Article 20 of Labor Law of State of New York. Sections 701, sub. 2; 703, 704, subs. 4, 5 and 10 are set forth in the Appendix to petitioners' brief, pages 25-6.

SECTION 706:

§ 706. *Prevention of unfair labor practices.* 1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

2. Whenever a charge has been made that any employer has engaged in or is engaging in any unfair labor practice, the board shall have power to issue and cause to be served upon such employer a complaint stating the charges in that respect and containing a notice of hearing before the board at a place therein fixed to be held not less than seven days after the serving of said complaint. Any such complaint may be amended by the board or its agent conducting the hearing at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint not less than five days after the service of such original or amended complaint and to appear in person or otherwise to give testimony at the place and time set in the complaint. In the discretion of a member or agent conducting the hearing, or of the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the board or its agent shall not be bound by technical rules of evidence prevailing in the courts of law or equity.

3. The testimony taken at the hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon all the testimony taken the board shall determine that the respondent has engaged in or is engaging in any unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair labor practice, and to take such further affirmative or other action as will effectuate the policies of this article, including, but not limited to (a) withdrawal of recognition from and refraining from bargaining collectively with any employee organization or association, agency or plan defined in this article as a company union or established, maintained or assisted by any action defined in this article as an unfair labor practice; (b) awarding of back pay; (c) reinstatement with or without back pay of any employee discriminated against in violation of section seven hundred four, or maintenance of a preferential list from which such employee shall be returned to work; (d) reinstatement with or without back pay of all employees whose work has ceased or whose return to work has been delayed or prevented as the result of the aforementioned or any other unfair labor practice in respect to any employee or employees or maintenance of a preferential list from which such employees shall be returned to work. Such order may further require such person to make reports from time to time showing the extent to which the order has been complied with. If upon all the testimony the board shall be of the opinion that the person or persons named in the complaint have not engaged in or not engaging in any such unfair labor practice, then the board shall make its findings of fact and shall issue an order dismissing the complaint.

4. Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the board

may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

5. The board shall not require as a condition of taking action or issuing any order under this article, that employees on strike or engaged in any other lawful, concerted activity shall discontinue such strike or such activity.

6. The board shall consider all complaints or petitions filed with it and conduct all proceedings under this article with all possible expedition.

SECTION 707, SUBS. 1, 2, 3 AND 4:

§ 707. *Judicial review.* 1. The board shall have power to petition the supreme court of the state within the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was made and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

2. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent, or agency, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the transcript. The board may modify its finding as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

3. The jurisdiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved. (As amended by Chapter 210 of the Laws of 1942.)

4. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the supreme court of the county where the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, by filing in such court a written petition praying that the order of the board be modified or set aside, or if such court be on vacation or in

recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any such person resides or transacts business. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under section seven hundred six, and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts shall in like manner be conclusive.

(34)

FILED
JUN 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216.

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

REPLY BRIEF IN SUPPORT OF PETITION.

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REPLY BRIEF IN SUPPORT OF PETITION.

Respondent's Point I Is Based Upon Mis-construction of Both the Judicial Code and the Appellate Procedure of the Courts of New York, and Upon Mis-interpretation of the Authorities Cited By It.

The writ of certiorari prayed for by the petition herein is one sought to be directed to the Supreme Court of the State of New York. Respondent's argument, in support of its Point I (respondent's brief, pages 5, *et seq.*) seeks to create the impression that the writ sought is to be directed to the Court of Appeals of the State of New York. This is indicative of the confusion into which respondent has fallen.

The sole issue in respect of this is whether there has been compliance below with the condition precedent set up by the Judicial Code (§237, amended). The Code provision requires merely that there has been rendered or passed a final judgment or decree " * * * by the highest court of a State in which a decision could be had * * *." If such be the case here, then respondent's Point I is wholly without merit.

The final order below was the order of the Supreme Court of New York, County of New York, dated December 8th, 1944, and made on the Remittitur of the Court of Appeals (R. 1403-4). That order is the final order in this proceeding in the State of New York, and is entirely silent on the matter of costs (compare respondent's brief, p. 7). The entire record of the State proceedings is now lodged with the Supreme Court, New York County, and nowhere else.

That the confusion into which respondent has fallen may be clearly comprehended, brief reference is here made to the pertinent statutory and practice provisions of the State of New York.

The State Labor Relations Act (Labor Law of the State of New York, Article 20, §707, subd. 3), entitled Judicial Review, provides as follows:

> "The jurisdiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved."

Pursuant thereto, petitioners had appealed first to the Supreme Court, then to the Appellate Division, and finally to the Court of Appeals, which appeals were "in the manner and subject to the limitations provided in the civil practice act * * * ".

The appeal to the Supreme Court, County of New York, was by order to show cause and supporting petition (R. 5-16).

The appeal to the Appellate Division of the Supreme Court, First Judicial Department, was by notice of appeal (R. 2-3).

Following the unanimous affirmance by the Appellate Division (R. 1369-70), petitioners no longer had available to them any appeal as a matter of right (Civil Practice Act of New York, Article 38, §589), as provided in the Civil Practice Act (§588). The Appellate Division having affirmed without opinion, the grounds of its affirmance were unknown. That affirmance may have been based upon the provisions of the State Labor Relations Act, which provide that:

> "The findings of the board as to the facts, if supported by evidence, shall be conclusive" (§707).

Or, that affirmance may have been upon the ground that the constitutional issue raised by petitioners was without merit. Either suffices. In any event, the Court of Appeals had complete jurisdiction.

That being so, and despite the provision of the Civil Practice Act, that an appeal lies to the Court of Appeals as of right if "there be directly involved the construction of the constitution of the state or of the United States;" (Civil Practice Act, §588 1[a]), petitioners could not avail themselves of this provision because the issue below was determinable on a basis not limited exclusively to construction of the constitutional provisions urged.

> *People of the State of New York ex rel. Ryan* v. *Lynch, et al.,* 262 N. Y. 1, at page 4.

Consequently, petitioners could only seek permission to appeal. This they did, first to the Appellate Division (R. 1372-7), and upon being denied there, then to the

Court of Appeals itself (R. 1382-5). No further, nor other step, was possible.

Respondent argues nevertheless, on undisclosed authority, that the Appellate Division was the highest court of the State of New York "which has adjudicated the merits of the controversy" and therefore the writ of certiorari should have been directed to that Court (respondent's brief, p. 7). Nowhere in the Judicial Code (§237) will there be found any reference whatsoever to the phrase "adjudicated the merits of the controversy". The authorship of those words is exclusively respondent's.

This Court has considered this very issue. In addition to *Department of Banking of Nebraska, Receiver*, v. *Pink*, 317 U. S. 264 (cited in petitioners' brief, page 6), the same proposition was similarly decided in the following cases:

> *Gorman* v. *Washington University*, 316 U. S. 98;
> *Chesapeake & Ohio Railway Co.* v. *Mihas*, 280 U. S. 102;
> *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Rock*, 279 U. S. 410.

In the case last cited, this Court cited with approval from prior decisions:

> "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, *over which it by law can exercise appellate authority*, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach" (page 412). (Italics supplied.)

The test, as stated in *Gorman* v. *Washington University, supra*, is whether " * * * the possibilities afforded by state procedure for its review by all state tribunals have been exhausted" (pages 100-1).

In *Chesapeake & Ohio Railway Co.* v. *Mihas, supra,* this Court re-affirmed its holding " * * * that the denial of application for certiorari by the state supreme court was in effect an affirmance of the judgment * * * " (page 104).

The proceeding at bar falls squarely within the purview of these authorities. Whether the application to the highest court of the State be by appeal as of right, by petition for certiorari, or by petition for permission to appeal, it suffices that a petitioner for certiorari to this Court has exhausted every course open to him under the State procedure. There is literally no question that that is precisely what happened here.

The authorities cited by respondent (respondent's brief, p. 7, footnote 1) merely exemplify the confused state of respondent's argument. Indeed, these authorities support petitioners. In *Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364, the Supreme Court of Appeals of Virginia denied a writ of error from the Law and Equity Court of the City of Richmond. This Court, specifically finding that " * * * the law and equity court was the highest court of the state to which the case could be carried * * * " (page 366), held that the writ would therefore lie to that court.

Second National Bank v. *First National Bank,* 242 U. S. 600, and *Cuyahoga River Power Co.* v. *Northern Realty Company, et al.,* 244 U. S. 300, involved similar situations arising under procedure in the State of Ohio. In the former case this Court held that as the Court of Appeals of Ohio, which had affirmed the judgment of the Superior Court of Cincinnati, was the highest court in Ohio in which a final judgment could have been rendered, the writ of error should have run to the Court of Appeals and not to the Superior Court. In the *Cuyahoga* case, the objection that the writ of error should have been prosecuted to the Supreme Court of Ohio instead of to the Court of Appeals, was treated as without merit, on the ground that the Supreme Court of Ohio had dismissed the writ of error

to it for want of jurisdiction. Obviously then, in both of those instances the Court of Appeals was the highest court of the state "in which a decision could be had".

Similarly, this Court, in *Missouri, Kansas & Texas Railway Co.* v. *Elliot*, 184 U. S. 530 (miscited as page 529), having found that the Kansas City Court of Appeals "* * * was the final court in Missouri where such question could be decided, * * *" (page 539), held that the objection that the writ of error should have run to the Supreme Court of Missouri was without foundation.

The remaining authorities cited by respondent involve the same proposition. In every instance the objection urged was either sustained or denied, based entirely upon application of the criterion whether the highest court of the State in which a determination could have been had, had passed upon the matter. That test is fully met here.

The Court of Appeals could have modified or set aside, in whole or in part, respondent's order. By denying leave to appeal, though fully armed with jurisdiction, it affirmed the order (State Labor Relations Act, §707, subd. 4). Note *Chesapeake & Ohio Railway Co.* v. *Mihas, ubi supra*, page 5.

Respondent seeks further to becloud the issue here by reference to an unappealed from order made on August 18th, 1943 (respondent's brief, page 4). That order is no part of this record, except that respondent did urge that same point before both the Appellate Division (R. 1378, pa. 2, 1380, pa. 10) and the Court of Appeals (R. 1386-7). The order referred to, of course, is not involved here.

The appellate courts of New York very properly paid no attention to this contention, as indeed they could not, in view of the statutory provisions (State Labor Relations Act, §707, subd. 3).

Conclusion.

The highest Court of the State of New York which had jurisdiction to render a final judgment or decree in

this matter is the Court of Appeals. That Court, by denying leave to appeal to it, rendered a final judgment in this matter which, by its Remittitur, was made the order of the Supreme Court of the State of New York. The writ of certiorari here prayed for is sought to be directed to the Supreme Court of the State of New York.

Respondent compounds its confusion by characterizing petitioners' assignment of errors as "deficient" (respondent's brief, page 8). This alleged deficiency apparently is part of its argument urged in Point I, to-wit, that the petition for the writ of certiorari has been mis-directed, but the authorities cited by it (respondent's brief, page 8, footnote 2) are concerned solely with deficiencies in form and substance of specification of errors. These authorities are not germane to this Point I at all.

Finally, it is well to note that in its argument in chief (Point II, respondent's brief, page 8), respondent disregards completely the distinction that it sought to make in its argument under its Point I, for it refers to "the courts below", without any distinction whatsoever.

The procedural objection urged by respondent is wholly without merit and the writ petitioned for is properly directed to the Supreme Court of the State of New York.

> "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or hereafter may be prescribed by law not inconsistent with this article" (Constitution of the State of New York, Article VI, Section 1).

Sol. A. Herzog,
Attorney for Petitioners.

May, 1945.

CIVIL PRACTICE ACT.

Article 38.

Appeals to the Court of Appeals.

§588. Appeal as of right.

Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States;

§589. Appeal by permission.

Appeal to the court of appeals by permission lies only * * *

2. by permission of the appellate division, or in case of refusal of such permission, by permission of the court of appeals, from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provision (a), or (b), or (c) of subdivision one of section five hundred and eighty-eight of this act.